UNIVERSITY
OF CALIFORNIA
LOS ANGELES

SCHOOL OF LAW
LIBRARY

A SELECTION OF CASES

ON THE

LAW OF QUASI-CONTRACTS.

BY

WILLIAM A. KEENER,

STORY PROFESSOR OF LAW IN HARVARD UNIVERSITY.

VOLUME I.

CAMBRIDGE:
CHARLES W. SEVER.
1888.

T
K25289u
1888
v.1

Copyright, 1888,
By William A. Keener.

333279
8-7-57
Adj.

University Press:
John Wilson and Son, Cambridge.

PREFACE.

THIS collection of cases deals in the main with that portion of the law of quasi-contracts depending on the theory of unjust enrichment, and enforceable at common law by the use of the indebitatus counts. While much that is exclusively of equitable cognizance might properly be discussed under the title of quasi-contracts, the fact that such topics are treated in other courses in the School renders it unnecessary to refer to them in a collection intended primarily for the use of Harvard Law Students.

That Quasi-Contracts has been chosen as a title will not be a surprise to any one familiar with the confusion existing in the cases in consequence of the indiscriminate use of the term "Implied Contract," — the term being used not only with reference to a contract implied in law, which is not a contract at all, but also with reference to a contract implied in fact, which is a true contract. It is safe to say that the development of this branch of the law has been much retarded by a confusion of ideas consequent upon this confusion of terms.

The method of teaching by cases has grown steadily in favor since its introduction in the Harvard Law School, and has almost universally commended itself to those who have examined it, or have seen its fruits. As these volumes may, however, fall into the hands of persons not acquainted with the use made of the cases, a few words relating thereto may not be out of place. While this method of teaching does not at all proceed on the idea that the common law is wanting in jurists, its advocates regard the adjudged cases as the original sources of our law, and think that it is better for the student, under proper advice and guidance, to extract from the cases a principle, than to accept the statement of any jurist, however eminent he

may be, that a certain principle is established by certain cases. When the student has by the study of cases grasped a principle, it has assumed to him a concrete form, and he can apply it because it was by studying it in its application that he has acquired his knowledge. Under this system the student must look upon law as a science consisting of a body of principles to be found in the adjudged cases, the cases being to him what the specimen is to the geologist. And judged from this point of view an overruled case may be of as much importance as a decision that has never been questioned. For example, the case of Moses *v.* Macferlan, 2 Burr. 1002, is generally regarded as overruled. Yet no opinion in which the count for money had and received is discussed, is so often referred to as the opinion of Lord Mansfield in that case. And no student can afford to ignore the case.

A system in which principles are studied in their application to facts would seem to combine in the highest possible degree the theoretical and practical. In no other way can a student so thoroughly acquaint himself with the methods used by judges in applying principles of law to the facts before them. It must be borne in mind that this method of teaching does not consist in lectures by the instructor, with references to the cases in support of the propositions stated by him. The exercises in the lecture-room consist in a statement and discussion by the students of the cases studied by them in advance. This discussion is under the direction of the instructor, who makes such suggestions and expresses such opinions as seem necessary. The student is required to analyze each case, discriminating between the relevant and irrelevant, between the actual and possible grounds of decision. And having thus discussed a case, he is prepared and required to deal with it in its relation to other cases. In other words, the student is practically doing as a student what he will be constantly doing as a lawyer. By this method the student's reasoning powers are constantly developed, and while he is gaining the power of legal analysis and synthesis, he is also gaining the other object of legal education, namely, a knowledge of what the law actually is.

A word as to text-books. An inspection of the books on the shelves of the library will show how erroneous is the idea that text-books have been banished from the School. The instructors not only

endeavor to acquaint the students with the relative merits of the various authors, but also make such references to text-books during the course of the lecture as may be necessary.

As the printing of head-notes would be inconsistent with this system of teaching, they have been omitted. To keep the book within the proper limits as to size and cost, it has been necessary to omit as a rule the arguments of counsel. An index at the end of the second volume will, it is hoped, render the book somewhat useful to the practising lawyer.

The Editor reserves for a treatise on the law of Quasi-Contracts what might otherwise appear in a summary.

WILLIAM A. KEENER.

CAMBRIDGE, Oct. 1, 1888.

CONTENTS OF VOL. I.

CHAPTER I.

NATURE OF THE OBLIGATION.

SECTION I.

PAGE

WHEREIN IT DIFFERS FROM CONTRACT 1

SECTION II.

WHEREIN IT DIFFERS FROM TORT 29

CHAPTER II.

FAILURE OF CONSIDERATION.

SECTION I.

MISTAKE 69

a. Mistake may be as to Law or Fact 69
b. Mistake may be as to the Creation of a Contract 182
c. Mistake may be as to the Validity or Amount of a Claim 212
d. A Claim may be paid under a Mistake as to a Collateral Fact 304
e. Mistake may be as to Title of Vendor 337
f. Mistake may be as to the Existence or Identity of the Subject-Matter of Sale 390
g. There must be an unjust Enrichment of Defendant at Plaintiff's Expense 403
h. When a Demand is necessary 416
i. Plaintiff's Negligence no Bar to a Recovery 428
j. Defence of Purchase for Value 435
k. Effect of Defendant's Change of Position 451

SECTION II.

FAILURE OF DEFENDANT TO PERFORM CONTRACT 482

a. Defendant relying on Statute of Frauds 482
b. Performance impossible 515

TABLE OF CASES.

	Page
Adamson, *Ex parte*	37
Aiken *v.* Short	305
Anglo-Egyptian Navigation Co. *v.* Rennie	532
Appleton Bank *v.* McGilvray	430
Arnold *v.* R. & B. Co.	164
Attorney-General *v.* Perry	435
Bank of Commerce *v.* Union Bank	236
Bank of England *v.* Tomkins	399
Bilbie *v.* Lumley	77
Billings *v.* Monmouth	209
Bingham *v.* Bingham	73
Bize *v.* Dickason	75
Bond *v.* Aitkin	199
Bonnel *v.* Fouke	70
Boylston Bank *v.* Richardson	317
Bree *v.* Holbech	390
Brisbane *v.* Dacres	79
Buel *v.* Boughton	411
Canal Bank *v.* Bank of Albany	231
Carnac, *In re*	109
Carpenter *v.* Northborough Bank	260
Chambers *v.* Miller	308
Chatfield *v.* Paxton	77 note
Claflin *v.* Godfrey	131
Clare *v.* Lamb	379
Clarke *v.* Dutcher	114
Cochram *v.* Welby	5
Cocks *v.* Masterman	224
Collie, *In re*	37
Commerce, Bank of, *v.* Union Bank	236
Condon, *In re*	106
Cooper *v.* Phibbs	96
Corn Exchange Bank *v.* Nassau Bank	270
Cripps *v.* Reade	337
Culbreath *v.* Culbreath	153
Day *v.* R. R. Co.	503
Deery *v.* Hamilton	204
De Hahn *v.* Hartley	273
De Silvale *v.* Kendall	515
Dibbs *v.* Goren	95
Dix *v.* Marcy	509
Dowling *v.* McKenney	513
Durrant *v.* Commissioners	462
Eichholz *v.* Bannister	368
England, Bank of, *v.* Tomkins	399
Farmer *v.* Arundel	73
Feise *v.* Parkinson	187
First Baptist Church *v.* Caughey	205
First National Bank *v.* Mastin Bank	302
Franklin Bank *v.* Raymond	407
Freeman *v.* Jeffries	416
Goddard *v.* Merchants' Bank	239
Gompertz *v.* Bartlett	401
Gray *v.* Hill	483
Greer *v.* Greer	489
Griggs *v.* Austin	537
Gurney *v.* Womersley	363
Hambly *v.* Trott	30
Harris *v.* Loyd	304
Haven *v.* Foster	123
Hawley *v.* Moody	491
Hemphill *v.* Moody	167
Hewer *v.* Bartholomew	69
Higgs *v.* Scott	195
Hirst *v.* Tolson	521
Hitchcock *v.* Giddings	397
Hodsden *v.* Harridge	2
Hoffman *v.* Bank of Milwaukee	249
Hollis *v.* Edwards	482
Hubbard *v.* Hickman	413
Irving *v.* Richardson	289

	Page
Jackson *v.* McKnight	415
James, *Ex parte*	106
Johnson *v.* Johnson	358
Jones *v.* Ryde	393
Kelley *v.* Lindsey	202
Kelly *v.* Solari	428
Kilgour *v.* Finlyson	183
Kingston Bank *v.* Eltinge	463
Knowles *v.* Bovill	523
Knowlman *v.* Bluett	484
Lansdowne *v.* Lansdowne	72
Leather *v.* Simpson	226
Livesey *v.* Livesey	88
London *v.* Goree	4
Louisiana *v.* New Orleans	23
McArthur *v.* Luce	434
McCarthy *v.* Decaix	91
McCulloch *v.* Assurance Co.	188
McKleroy *v.* Southern Bank	246
Malcolm *v.* Fullarton	287
Martin *v.* Sitwell	182
Mayer *v.* New York	283
Merchants' Ins. Co. *v.* Abbott	443
Merchants' National Bank *v.* Eagle Bank	312
Merchants' National Bank *v.* National Bank	329
Milford *v.* Commonwealth	27
Mills *v.* Alderbury Union	278
Milnes *v.* Duncan	275
Morley *v.* Attenborough	347
Munt *v.* Stokes	403
National Bank *v.* Bangs	256
Nowall *v.* Tomlinson	458
Northrop *v.* Graves	145
Parker *v.* Tainter	511
People *v.* Gibbs	65
People *v.* Speir	17
Perkinson *v.* Gilford	29
Phillips *v.* Humfrey	15
Planter *v.* Turin Co.	162
Platt *v.* Brennage	405
Pooley *v.* Brown	454
Powell *v.* Rees	35
Price *v.* Neal	212
Pulbrook *v.* Lawes	485
Ray *v.* Bank of Kentucky	141
Rogers *v.* Walsh	178
Sceva *v.* True	10
Sharkey *v.* Mansfield	424
Shove *v.* Webb	392
Simmonds, *Ex parte*	109
Smith *v.* Mercer	214
Smith *v.* Smith	494
Smout *v.* Ilbery	196
Southwick *v.* Bank of Memphis	319
Speake *v.* Richards	1
Standish *v.* Ross	451
Stanley Co. *v.* Bailey	432
Steamship Co. *v.* Joliffe	6
Strickland *v.* Turner	356
Stuart *v.* Sears	300
Sturgis *v.* Preston	426
Talbot *v.* National Bank	285
Taylor *v.* Hare	185
Townsend *v.* Crowdy	291
Turner *v.* Turner	71
Union National Bank *v.* Sixth National Bank	473
Van Deusen *v.* Blum	197
Waples *v.* United States	179
Webb *v.* Alexandria	172
Welch *v.* Goodwin	264
Wheadon *v.* Olds	298
Whincup *v.* Hughes	527
White *v.* Continental National Bank	476
White *v.* National Bank	387
Wilkinson *v.* Johnston	220
Williams *v.* Bemis	500
Wood *v.* Sheldon	383
Wright *v.* Newton	520
Young *v.* Cole	344
Youmans *v.* Edgerton	439

CASES ON QUASI-CONTRACTS.

CHAPTER I.

NATURE OF THE OBLIGATION.

SECTION I.

WHEREIN IT DIFFERS FROM CONTRACT.

SPEAKE *v.* RICHARDS.

In the Common Pleas, Trinity Term, 1618.

[*Reported in Hobart*, 206.]

Hugh Speake brought an action of debt, of five hundred and twenty-three pounds and seventeen shillings, against Edward Richards, late high sheriff of the county of Southampton, and declared that one Paramour and others were bound by recognizance in chancery in two thousand pounds to the plaintiff, and that after other process and judgment, 10 *Julii* 14 Jac., the plaintiff sued a *levari fac.* to the defendant, returnable 15 Mich., which was delivered Aug. 1, whereupon the defendant levied the sum, and at the day returned that he had levied the same sum, *quos paratos habeo*, and yet did not deliver it in court; *per quod*, &c. The defendant, *quoad* 308, pleaded *nihil debet*, whereupon the plaintiff took issue; and as to the rest he pleads, that after the issuing of the writ, and before the return, *scil.* Aug. 31, he did pay unto the plaintiff the same sum, whereupon the plaintiff, by his acquittance, the same day, reciting that he had received it, did acquit him of it; whereupon the plaintiff demurred in law.

The first question[1] in this case was, whether the action of debt would lie, because there was no contract between the plaintiff and the sheriff. But that was resolved by the court that it would lie; for though there were no actual contract yet there was a kind of contract in law, so it is *ex quasi contractu*. And therefore upon damages recovered in an action of trespass, the plaintiff shall have an action of debt; and by the same reason when the money is levied by the sheriff, so as the action ceased against the defendant, the same action is *ipso facto* by law transferred to the sheriff,

[1] Only so much of the case is given as relates to this question. — Ed.

having both the judgment to make it a debt, as before, and the levy to make him answerable; like unto the case of 1 H. 7. of a tally delivered to the customer, as soon as money comes into his hands he is made a debtor. *Quære*, if an action of debt may not be had against the executor as the principal debtor, declaring of a *devastavit* by him. Debt lies by corporations for the penalties forfeited upon their laws; so for amerciaments in the court barons; so 11 H. 7. 14. for three pounds forfeiture, upon a custom for pound breach; and 34 H. 6. 36. & 9 E. 4. 50. It is holden that upon such levies by the sheriff appearing upon record, the court may award a *distringas*, or the party may have a *fieri fac.* or *elegit* against the sheriff, to levy as much of his own: see Mich. 8 H. 8. Reports, Crooke 187. O. N. in the exchequer makes the sheriff debtor to the king, and the debtor himself debtor to the sheriff; and though an action of account will lie properly in this case, yet the same case will many times bear both actions, though the money be received *per auter mains*, or the like. But then the action of account is necessary, when the first receipt *ab initio* was directed to a merchandizing, which makes uncertainty of the neat remain till account finished; or where a man is charged as bailiff of a manor, or the like, whereupon the certainty of his receipt appears not till account. Yet even in the case of merchandizing an action of debt will lie for the sum received before the merchandize, yea and after the merchandize, for so much as he hath not so employed; and therefore if I deliver an hundred pounds to one, to buy cattle, and he bestow fifty pounds of it in cattle, and I bring an action of debt for all, I shall be barred in that action for the money bestowed, and charges, &c.; but for the rest I shall recover.

HODSDEN *v.* HARRIDGE.

In the King's Bench, Hilary Term, 1670.

[*Reported in* 2 *Saunders*, 64.]

Debt on an award by Hodsden against Harridge; the plaintiff declares, that there were divers disputes and controversies between the plaintiff and defendant, concerning certain monies due to the plaintiff for malt sold and delivered by him to the defendant, and for quieting those controversies, the plaintiff and defendant, on the 24th day of October, in the 13th year of the reign of the now king, submitted themselves to the award of two arbitrators, and if they should not agree by a certain day, then to the umpirage of an umpire to be chosen by the arbitrators, so as the umpirage should be under the hand and seal of the umpire before another certain day; and the plaintiff avers that the arbitrators made no award, but chose one Weekes to be umpire who within the time made an umpirage under his hand and seal,

and thereby awarded the defendant to pay the plaintiff 15*l.* in full satisfaction of all debts, accounts and demands due to the plaintiff: and for the non-payment of the said 15*l.* the plaintiff brings his action, &c. The defendant pleads in bar the statute of limitations, and that the cause of action did not accrue within six years next before the exhibiting of the bill; and this, &c., therefore, &c., upon which it was demurred in law. And the question was, whether this action of debt on award be within the statute of 21 Jac. 1. c. 16. of limitations or not?

And it was argued by *Saunders* for the plaintiff, in Trinity term last past, that it was not within the statute; for the words of the statute are, "all actions of debt grounded upon any lending or contract without specialty, and all actions of arrearages of rent" shall be sued within six years, &c. And he argued in the first place, that it was a specialty.[1] Then it was argued upon the second point, that admitting there was no specialty at all, yet an action of debt on an award was not limited by the statute, for the words being as before, "all actions of debt grounded upon any lending or contract without specialty, &c." therefore all actions of debt without specialty generally are not limited, but only all actions of debt without specialty which are grounded upon any lending or contract; and here this action of debt is not founded upon any lending, and therefore it is not limited, though it be without specialty. And as to the objection on the other side, that in the present case the law raises a contract, as, on a judgment or recovery in trespass or trover, the law gives an action of debt as upon a contract raised by law, and therefore this case is within the express letter of the statute, being a debt grounded on a contract raised by law, it was answered, that all actions of debt whatsoever are founded upon a contract raised either in fact or by construction of law, and by such an exposition all actions of debt without specialty generally will be limited by the statute, which without question was not the true meaning of it; for if it had been so, the words "grounded upon any lending or contract" had been needless and superfluous: but the statute intends to restrain and limit those actions only which were founded upon any lending or contract in fact, as appears by the words; and the word lending explains the word contract to be of the same nature. And in the present case, the action of debt is not founded upon any lending or contract, but it is a debt *ex quasi contractu*, as the civilians term it, for which the law gives an action of debt, although there is no contract between the parties: so it is of a recovery in trover or trespass in the county court, or court baron; and the case of debt for an amerciament in a court baron, and so in 11 H. 7. debt for 3*l.* for a pound breach by the custom of the manor, are all of them actions of debt without specialty, because the defendant may wage his law against them, and yet they are not founded upon any lending or contract between the parties; and in the two last cases the debt is no contract, but is rather

[1] So much of the argument as relates to this question has been omitted. — Ed.

debitum ex delicto: and because those actions so rarely occur, and the actions of debt founded upon express contracts between men without specialty are so frequent every day, the statute intends to restrain and limit the last mentioned actions, without having any regard to the others on account of the paucity of them, from the non-limitation of which the makers of the statute did not find any such inconvenience as they found in the non-limitation of actions of debt founded upon contracts in fact; *et ad ea quæ frequentius accidunt jura adaptantur*, as is said in *Sherwin* and *Cartwright's* case,[1] where it is adjudged that an action *de rationabili parte bonorum*, although in its nature it is only an action of detinue, which is expressly limited by the statute, yet it was not within the statute of limitations, because it was an action which seldom happens; and therefore it was concluded, that this action was not within the statute of limitations.

Jones for the defendant argued, that it was within the statute, and strongly enforced the two objections before mentioned; but after it had been twice argued in *Trinity* term, the whole court resolved for the plaintiff. Kelynge, Chief Justice, principally for the first point, that there was a sufficient specialty to prevent the statute of limitations; and Twysden, Justice, principally for the second point, that this action was not within the limitation of the statute at all, because it was not founded upon any lending or contract; the other judges consenting to both points; wherefore a rule was given for judgment for the plaintiff, unless cause, &c.; but on the day of shewing cause, *Jones* moved, that the demurrer might be waived, and the defendant be permitted to plead the general issue; and because *Saunders* would not consent, it was adjourned over to *Michaelmas* term, and hung until this term; and it being now in the paper of causes, it was moved again for judgment for the plaintiff; and *Jones* would have spoken to it, but Twysden, Justice, said, that it was resolved by the court, in *Trinity* term before, for the plaintiff on both points; wherefore, in the absence of Kelynge, he gave a rule for judgment, and the plaintiff had his judgment accordingly; whereupon the defendant brought a writ of error, but was afterwards nonsuited, as I was informed.

THE CITY OF LONDON *v.* GOREE.

In the King's Bench, Trinity Term, 1677.

[*Reported in* 1 *Ventris*, 298.]

An indebitatus assumpsit was brought for the duty of Scavage, and declared upon the Custom of London, that every one which exposes foreign goods to sale which had been entred in the Custom-house, shall pay so

[1] Hutt. 109.

much for shewing of them: after verdict it was alledged in arrest of judgment, that no assumpsit lay for such a duty, for there ought to be a contract, express or implied, to maintain an assumpsit.

Again, forasmuch as the customs of the City are confirmed by Parliament, this is a duty by record: *sed non allocatur;* for there are multitudes of precedents in such like cases. An assumpsit lies upon a bill of exchange accepted; an assignee of commissioners of bankrupt may bring an assumpsit, and yet the debt is assigned by virtue of an Act of Parliament. And the Court said, in such case as this the declaration might be upon an indebitatus assumpsit, as it was in the case at bar.

COCKRAM, EXECUTOR, *v.* WELBY.

In the Common Pleas, Easter Term, 1678.

[*Reported in* 2 *Modern*, 212.]

In debt, the plaintiff declared that his testator recovered a judgment in this court, upon which he sued out a *fieri facias*, which he delivered to the defendant, being sheriff of Lincoln; and thereupon the said sheriff returned *fieri feci*, but that he hath not paid the money to the plaintiff, *per quod actio accrevit*, &c. The defendant pleaded the statute of limitations. To which the plaintiff demurred.

The question was, whether this action was barely grounded on the contract, or whether it had a foundation upon matter of record? If on the contract only, then the statute of 21. Jac. 1, c. 16. is a good plea to bar the plaintiff of his action, which enacts, "that all actions of debt grounded upon any lending or contract without specialty, shall be brought within six years next after the cause of action doth accrue;" and in this case nine years had passed. But if it be grounded upon matter of record, that is a specialty, and then the statute is no bar.

Barrel, Serjeant, held this to be a debt upon a contract without specialty; for when the sheriff had levied the money, the action ceases against the party, and then the law creates a contract, and makes him debtor, as it is in the case of a tally delivered to a customer. It lies against an executor, where the action arises *quasi ex contractû*, which it would not do if it did not arise *ex maleficio*, as in the case of a *devastavit*. It is true, the judgment recovered by the testator is now set forth by the plaintiff's executor; but that is not the ground but only an inducement to the action, for the plaintiff could not have pleaded "*nul tiel record;*" so that it is the mere receiving the money which charges the defendant, and not *virtute officii* upon a false return; for upon the receipt of the money he is become debtor, whether the writ be returned or not, and the law immediately

creates a contract; and contracts in law are as much within the statute as actual contracts made between the parties.

All this was admitted on the other side; but it was said, that this contract in law was chiefly grounded upon the record; and compared it to the case of attornies fees, which hath been adjudged not to be within the statute, though it be *quasi ex contractu*, because it depends upon matter of record. 1. Roll. Abr. 598. pl. 17.

And afterwards, in Michaelmas Term following, by the opinion of NORTH, Chief Justice, WYNDHAM and ATKINS, Justices, it was held, that this case was not within the statute, because the action was brought against the defendant as an officer who acted by virtue of an execution, in which case the law did create no contract; and that here was a wrong done, for which the plaintiff had taken a proper remedy and therefore should not be barred by this statute.

SCROGGS, Justice, was of a contrary opinion; for, he said, if another received money to his use due upon bond the receipt makes the party subject to the action, and so is within the statute.

But by the opinions of the other Justices judgment was given for the plaintiff.

STEAMSHIP COMPANY *v.* JOLIFFE.

IN THE SUPREME COURT OF THE UNITED STATES. December, 1864.

[*Reported in* 2 *Wallace*, 450.]

Messrs. *Cope*, *Yale*, and *Carlisle*, for the defendant in error.

Mr. *McCullough* for the State of California.

Mr. Justice FIELD delivered the opinion of the court.[1]

This case arises upon the act of the State of California, of the 20th of May, 1861, entitled "An act to establish pilots and pilot regulations for the port of San Francisco." The act provides for the creation of a Board of Pilot Commissioners, and authorizes the board to license such number of pilots for the port as it may deem necessary, and prescribes their qualifications, duties, and compensation. It makes it a misdemeanor, punishable by fine or imprisonment, for any person not having a license from the board, to pilot any ship or vessel in or out of the port by way of the "Heads," that is, by the way which leads directly to and from the ocean. It enacts that "all vessels, their tackle, apparel, and furniture, and the masters and the owners thereof, shall be jointly and severally liable for pilotage fees, to be recovered in any court of competent jusisdiction." And it declares, that when a vessel is spoken by a pilot and his services are de-

[1] The facts being sufficiently stated in the opinion of the Court, the statement of facts has been omitted. — ED.

clined, he shall be entitled to one-half pilotage fees, except when the vessel is in tow of a steam-tug outward bound, in which case no charge shall be made, unless a pilot be actually employed.

On the 1st of November, 1861, the plaintiff in the court below, the defendant in error in this court, was a pilot for the port of San Francisco having been regularly appointed and licensed by the board created under the act of the State. At that time the steamship Golden Gate was lying in the port, and about to proceed to Panama, carrying passengers and treasure. This vessel was then, and ever since 1852 had been, an American ocean steamer, registered at the custom-house, in the port of New York, and exclusively employed in navigating the ocean, and carrying passengers and treasure between San Francisco and Panama, and was owned by the Pacific Mail Steamship Company, a corporation created under the laws of the State of New York. To the master of this steamship the plaintiff offered his services to pilot the vessel to sea; but his services were refused, and to recover the half-pilotage fees allowed in such cases by the act of 1861, the present action was brought.

At the last term of this court, it was suggested that the constitutionality of the act in question was involved in the decision of the case; and the court thereupon reserved its consideration until the State of California could be represented. The Attorney-General of the State has accordingly appeared and filed a brief in the case. Since the action of the court in this respect, the legislature of California has passed a new statute on the subject of pilots and pilot regulations for the port of San Francisco, re-enacting substantially the provisions of the original act, but at the same time in terms repealing that act. And the first point made by the Attorney-General is, that, by reason of the repeal,[1] the present action cannot be maintained. His position is, that as the claim to half-pilotage fees was given by the statute, the right to recover the same fell with the repeal of the statute; and that this court must dismiss the writ of error on that ground.

The claim to half-pilotage fees, it is true, was given by the statute, but only in consideration of services tendered. The object of the regulations established by the statute was to create a body of hardy and skilful seamen, thoroughly acquainted with the harbor, to pilot vessels seeking to enter or depart from the port, and thus give security to life and property exposed to the dangers of a difficult navigation. This object would be in a great degree defeated if the selection of a pilot were left to the option of the master of the vessel, or the exertions of a pilot to reach the vessel in order to tender his services were without any remuneration. The experience of all commercial states has shown the necessity, in order to create and maintain an efficient class of pilots, of providing compensation, not only when the services tendered are accepted by the master of the vessel, but also when they are declined. If the services are accepted, a contract is

[1] Only so much of the case is given as relates to this question. — Ed.

created between the master or owner of the vessel and the pilot, the terms of which, it is true, are fixed by the statute; but the transaction is not less a contract on that account. If the services tendered are declined, the half fees allowed are by way of compensation for the exertions and labor made by the pilot, and the expenses and risks incurred by him in placing himself in a position to render the services, which, in the majority of cases, would be required. The transaction, in this latter case, between the pilot and the master or owners, cannot be strictly termed a contract, but it is a transaction to which the law attaches similar consequences; it is a *quasi* contract. The absence of assent on the part of the master or owner of the vessel does not change the case. In that large class of transactions designated in the law as implied contracts, the assent or convention which is an essential ingredient of an actual contract is often wanting. Thus, if a party obtain the money of another by mistake, it is his duty to refund it, not from any agreement on his part, but from the general obligation to do justice which rests upon all persons. In such case the party makes no promise on the subject; but the law, "consulting the interests of morality," implies one; and the liability thus arising is said to be a liability upon an implied contract.[1] The claim for half-pilotage fees stands upon substantially similar grounds.

"There are many cases," says Mr. Justice CURTIS, speaking for this court, "in which an offer to perform, accompanied by present ability to perform, is deemed by law equivalent to performance. The laws of commercial states and countries have made an offer of pilotage services one of those cases."[2]

The claim of the plaintiff below for half-pilotage fees resting upon a transaction regarded by the law as a *quasi* contract, there is no just ground for the position that it fell with the repeal of the statute under which the transaction was had. When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute. And such is the position of the claim of the plaintiff below in the present action: the pilotage services had been tendered by him; his claim to the compensation prescribed by the statute was then perfect, and the liability of the master or owner of the vessel had become fixed.

And it is clear that the legislature did not intend by the repealing clause in the act of 1864, to impair the right to fees, which had arisen under the original act of 1861. The new act re-enacts substantially all the provisions of the original act, relating to pilots and pilot regulations for the harbor of San Francisco. It subjects the pilots to similar examinations; it requires

[1] Argenti *v.* San Francisco, 16 Cal. 282; Maine, Ancient Law, 344.

[2] Cooley *v.* Board of Wardens of Port of Philadelphia, 12 How. 312.

like qualifications; it prescribes nearly the same fees for similar services; and it allows half-pilotage fees under the same circumstances as provided in the original act. It appears to have been passed for the purpose of embracing within its provisions the ports of Mare Island and Benicia, as well as the port of San Francisco; of creating a Board of Pilot Examiners for the three ports, in place of the Board of Pilot Commissioners for the Port of San Francisco alone, and of prohibiting the issue of licenses to any persons who were disloyal to the Government of the United States. The new act took effect simultaneously with the repeal of the first act; its provisions may, therefore, more properly be said to be substituted in the place of, and to continue in force with modifications, the provisions of the original act, rather than to have abrogated and annulled them. The observations of Mr. Chief Justice SHAW, in Wright *v.* Oakley,[1] upon the construction of the Revised Statutes of Massachusetts, which in terms repealed the previous legislation of the State, may with propriety be applied to the case at bar.

"In construing the revised statutes and the connected acts of amendment and repeal, it is necessary to observe great caution to avoid giving an effect to these acts which was never contemplated by the legislature. In terms, the whole body of the statute law was repealed; but these repeals went into operation simultaneously with the revised statutes, which were substituted for them, and were intended to replace them, with such modifications as were intended to be made by that revision. There was no moment in which the repealing act stood in force without being replaced by the corresponding provisions of the revised statutes. In practical operation and effect, therefore, they are rather to be considered as a continuance and modification of old laws than as an abrogation of those old and the re-enactment of new ones."

Judgment affirmed.[2]

[1] 5 Met. 406.

[2] Mr. Justice MILLER (with whom concurred WAYNE and CLIFFORD, JJ.,) dissented in an opinion, of which so much as relates to the nature of the defendant's obligation is as follows: —

"It is contended by counsel in the argument that the judgment in this case is based on contract, and that no repeal of the statute by State law can impair its obligation. This idea seems to me without foundation. The statute enacts, for the protection of the pilots of San Francisco, that a vessel approaching or leaving the harbor shall employ the first pilot, licensed under that law, who offers his services; and if the officers of the boat refuse, it renders the owners liable in an action by that pilot to half the usual pilot fees. If the officers of the vessel accept the pilot and his services, unquestionably the law implies a contract to pay either what they may reasonably be worth, or the sum fixed by statute. But if they refuse to accept him or his services, they violate the law; for which violation it imposes the penalty of half the usual pilot fees. Here is no element of contract; no consent of minds; no services rendered for which the law implies an obligation to pay. It is purely a case of a violation of the law in refusing to perform what it enjoins, and the enforcement of the penalty for the benefit of the party injured. It is just as easy to see a contract in a hundred other cases where the law imposes a penalty for its violation, and gives an action of debt for the recovery of that penalty." — ED.

SCEVA *v.* TRUE.

In The Supreme Judicial Court of New Hampshire, June, 1873.

[*Reported in* 53 *New Hampshire Reports*, 627.]

For the purpose of raising questions of law, and no other, the parties agreed that the facts are as stated in the following motions to dismiss, and the questions were reserved for the consideration of the whole court.

The defendant, by her guardian *ad litem*, moves to quash the writ in this suit, and to dismiss said suit: (1) Because, at the time of the attachment of the defendant's real estate in the town of Andover in said suit — as appears by the officer's return upon said writ — and at the time of the service of said writ, and for more than forty years prior thereto, she was, and had been, insane, and without any guardian, and was, and for more than a quarter of a century had been, so hopelessly insane as to have no reason or understanding: that at the time of such attachment and service, and since about November 1, 1871, she was, and has been, kept at a private mad-house in said town, by its overseers of the poor, as one of its insane poor; that the service of said writ was made and completed by leaving a writ of summons therein, at said mad-house; that, for nearly the entire forty years prior to said November 1, 1871, she had lived under the same roof with plaintiff's intestate, who was her brother-in-law, and under his charge, and that all the facts which transpired prior to the death of said intestate (about June 1, 1872) were well known to him, and that the plaintiff had notice or knowledge of all the facts in the premises. (2) That this suit is assumpsit for the support of said Fanny, under the circumstances before set forth, and those which follow. Prior to his death, August 11, 1822, William True, father of said Fanny and her sister Martha, wife of said intestate, owned a farm in Andover and Hill, with a house, barn, and out-buildings thereon, situate in said Andover. On May 25, 1822, in expectation of his death, said William True made the following disposition of his property: He gave, by an instrument in writing under seal, all his personal property, upon certain conditions and subject to certain charges, to his widow, Betsey True, who died upon said premises in May, 1844, without re-marrying. He also gave her on the same day, in the same way, "the use and occupation of said real estate, both of lands, buildings, and tenements, so long as she, the said Betsey, remains my widow." He also, by deed, conveyed on the same day one undivided half of all said real estate to each of said daughters. Said intestate carried on said premises in 1822, and married said Martha in December, 1823, and lived on said premises till about one month before his death. All the parties, save Fanny, treated said deeds and instruments as valid, and supposed they were valid; and,

aside from the time that the said defendant was away in insane asylums and infirmaries for treatment, all lived together on said premises in one family till they died, or until said Enoch F. Sceva refused to support said Fanny longer; and she was taken away about said November 1, and when said Enoch F. Sceva left, the month prior to his death. Said Sceva took the entire charge of the premises, used the crops and the proceeds of the lumber, wood, and bark, sold off of the whole farm for the common benefit of the family, and paid the taxes and other bills for the support and maintenance of the family. No administration was ever had upon any part of the estate of said William True, nor was there any use or trust for the benefit of said Fanny. No attempt was ever made to make any contract with said Fanny about her support, or anything else. No application was made for the appointment of a guardian in the interest of said Enoch F. Sceva, because of the opposition of his wife to any step looking to that end. She has been supported during said forty years by said Sceva, his wife, and her mother, out of the avails of said real estate taken as aforesaid, and out of their own funds. Since 1844 her chief support has been from said Sceva. Said intestate was worth nothing when he commenced on said farm, and died worth about $1600.

Shirley, for the defendant.

The foundation principle of the entire law of contracts is, that the parties must have the capacity to contract, and must actually exercise their faculties by contracting. Here there was no capacity, for there was but one mind; no contract was made, and no attempt was made to make one. The two vital facts, without which no contract, tacit or express, can exist — capacity and its exercise — are wanting. Was there an implied contract? What does that term mean? In thousands of cases, in the books, we know just what it means. The parties have capacity to contract; facts, circumstances, few or many, clear or complicated, exist, which lead the minds of the jurors to the conclusion that the minds of the parties met. Minds may meet by words, acts, or both. The words even may negative such meeting, but "acts which speak louder than words" may conclude him who denies a tacit contract. Aside from cases where the capacity to contract is wanting, no instance now occurs to us in which the implied contract cannot be supported upon these principles, and the familiar doctrines of waiver and estoppel. Our position is, that where there is no express contract, a jury may from circumstances infer one, but that this can in no case be done where the capacity to contract is wanting. This court has settled that there is a distinction between the cases of minors and lunatics. Burke *v.* Allen.[1] The reasons are apparent. It is another fundamental principle, that no one, by voluntarily performing services for another, can make that other his debtor. If these principles apply to cases where the contracting mind is wanting, they settle this case. We know it

[1] 29 N. H. 117.

is sometimes said, in such a case, "the law will imply a contract." What does that mean? As it seems to us, only this: that where A., who has capacity to contract, furnishes B., who is totally destitute of such capacity, what is proper for B. to have, the judges will turn the bench into a broker's board, will substitute themselves for B., make a contract where none existed, cause it to relate back to the voluntary acts of A., and then sit in judgment upon and enforce their own contract. It is a perversion of language to call such a performance a contract of any kind. It is judicial usurpation. The Constitution gave the court no such power. The court has no power to make contracts for people: it can only infer one where a jury might.[1]

Barnard for the plaintiff.

Ladd, J. It is obvious, we think, that one question which has been argued by counsel at considerable length, namely, whether legal service of a writ can be made upon an insane person or idiot, is not before the court, on this motion to dismiss, in such way that any practical results would be gained by deciding it. The agreement of the parties is not that the suit shall be dismissed in case the court are of opinion that the service was insufficient, but only that the facts may be taken to be as stated for no other purpose but to present the question to the court; and, if the decision should be adverse to the plaintiff, we see no reason why he is not still in a position to take the objection that the matter ought to have been pleaded in abatement in order that an issue may be raised for trial by jury upon the facts which he reserves the right to contest. For this reason we have not considered that question.

The other facts stated in the motion (which is to be regarded rather as an agreed case than a motion to dismiss) stand upon a different footing, inasmuch as they go to the merits of the case, and may be pleaded in bar or given in evidence under the general issue, and, when so pleaded or proved, their legal effect will be a matter upon which the court, at the trial, must pass. Some suggestions upon this part of the case may therefore be of use.

We regard it as well settled by the cases referred to in the briefs of counsel, many of which have been commented on at length by Mr. Shirley for the defendant, that an insane person, an idiot, or a person utterly bereft of all sense and reason by the sudden stroke of accident or disease, may be held liable, in assumpsit, for necessaries furnished to him in good faith while in that unfortunate and helpless condition. And the reasons upon which this rests are too broad, as well as too sensible and humane, to be overborne by any deductions which a refined logic may make from the circumstance that in such cases there can be no contract or promise in fact, no meeting of the minds of the parties. The cases put it on the ground of an implied contract; and by this is not meant, as the defendant's counsel seems to suppose, an actual contract, — that is, an actual meeting of the

[1] Counsel here cited a number of cases. — Ed.

minds of the parties, an actual, mutual understanding, to be inferred from language, acts, and circumstances, by the jury, — but a contract and promise, said to be implied by the law, where, in point of fact, there was no contract, no mutual understanding, and so no promise. The defendant's counsel says it is usurpation for the court to hold, as matter of law, that there is a contract and a promise, when all the evidence in the case shows that there was not a contract, nor the semblance of one. It is doubtless a legal fiction, invented and used for the sake of the remedy. If it was originally usurpation, certainly it has now become very inveterate, and firmly fixed in the body of the law.

Suppose a man steals my horse, and afterwards sells it for cash: the law says I may waive the tort, and recover the money received for the animal of him in an action of assumpsit. Why? Because the law, in order to protect my legal right to have the money, and enforce against the thief his legal duty to hand it over to me, implies a promise, that is, feigns a promise when there is none, to support the assumpsit. In order to recover, I have only to show that the defendant, without right, sold my horse for cash, which he still retains. Where are the circumstances, the language or conduct of the parties, from which a meeting of their minds is to be inferred, or implied, or imagined, or in any way found by the jury? The defendant never had any other purpose but to get the money for the horse and make off with it. The owner of the horse had no intention to sell it, never assented to the sale, and only seeks to recover the money obtained for it to save himself from total loss. The defendant, in such a case, may have the physical capacity to promise to pay over to the owner the money which he means to steal; but the mental and moral capacity is wanting, and to all practical intents the capacity to promise according to his duty may be said to be as entirely wanting as in the case of an idiot or lunatic. At all events, he does not do it. He struggles to get away with the money, and resists with a determination never to pay if he can help it. Yet the law implies, and against his utmost resistance forces into his mouth, a promise to pay. So, where a brutal husband, without cause or provocation, but from wanton cruelty or caprice, drives his wife from his house, with no means of subsistence, and warns the tradesmen not to trust her on his account, thus expressly revoking all authority she may be supposed to have, as his agent, by virtue of the marital relation, courts of high authority have held that a promise to pay for necessaries furnished her while in this situation, in good faith, is implied by law against the husband, resting upon and arising out of his legal obligation to furnish her support. See remark of SARGENT in Ray *v.* Alden,[1] and authorities cited. So, it was held that the law will imply a promise to pay toll for passing upon a turnpike road, notwithstanding the defendant, at the time of passing, denied his liability and refused payment. Proprietors of Turnpike *v.* Taylor.[2] In the

[1] 50 N. H. 83. [2] 6 N. H. 499.

recent English case of The Great Northern Railw. Co. *v.* Swaffield,[1] the defendant sent a horse by the plaintiff's railway directed to himself at S. station. On the arrival of the horse at S. station, at night, there was no one to meet it, and the plaintiffs, having no accommodation at the station, sent the horse to a livery stable. The defendant's servant soon after arrived and demanded the horse: he was referred to the livery stable keeper, who refused to deliver the horse except on payment of charges which were admitted to be reasonable. On the next day the defendant came and demanded the horse, and the station-master offered to pay the charges and let the defendant take away the horse; but the defendant declined, and went away without the horse, which remained at the livery stable. The plaintiffs afterwards offered to deliver the horse to the defendant at S. without payment of any charges, but the defendant refused to receive it unless delivered at his farm, and with payment of a sum of money for his expenses and loss of time. Some months after, the plaintiffs paid the livery stable keeper his charges, and sent the horse to the defendant, who received it; and it was held that the defendant was liable, upon the ground of a contract implied by law, to the plaintiffs for the livery charges thus paid by them.

Illustrations might be multiplied, but enough has been said to show that when a contract or promise implied by law is spoken of, a very different thing is meant from a contract in fact, whether express or tacit. The evidence of an actual contract is generally to be found either in some writing made by the parties, or in verbal communications which passed between them, or in their acts and conduct considered in the light of the circumstances of each particular case. A contract implied by law, on the contrary, rests upon no evidence. It has no actual existence; it is simply a mythical creation of the law. The law says it shall be taken that there was a promise, when, in point of fact, there was none. Of course this is not good logic, for the obvious and sufficient reason that it is not true. It is a legal fiction, resting wholly for its support on a plain legal obligation, and a plain legal right. If it were true, it would not be a fiction. There is a class of legal rights, with their correlative legal duties, analogous to the *obligationes quasi ex contractu* of the civil law, which seem to lie in the region between contracts on the one hand, and torts on the other, and to call for the application of a remedy not strictly furnished either by actions *ex contractu*, or actions *ex delicto*. The common law supplies no action of duty, as it does of assumpsit and trespass; and hence the somewhat awkward contrivance of this fiction to apply the remedy of assumpsit where there is no true contract, and no promise to support it.[2]

[1] L. R. 9 Ex. 132.

[2] The part of Roman law which has had most extensive influence on foreign subjects of inquiry has been the law of Obligation, or, what comes nearly to the same thing, of Contract and Delict. The Romans themselves were not unaware of the offices which the

All confusion in this matter might be avoided, as it seems to me, by a suitable discrimination in the use of the term implied contract. In the discussion of any subject, there is always danger of spending breath and strength about mere words, as well as of falling into error when the same term is used to designate two different things. If the term, implied con-

copious and malleable terminology belonging to this part of their system might be made to discharge, and this is proved by their employment of the peculiar adjunct *quasi* in such expressions as Quasi-Contract and Quasi-Delict. "Quasi," so used, is exclusively a term of classification. It has been usual with English critics to identify the quasi-contracts with implied contracts, but this is an error; for implied contracts are true contracts, which quasi-contracts are not. In implied contracts, acts and circumstances are the symbols of the same ingredients which are symbolized, in express contracts, by words; and whether a man employs one set of symbols or the other must be a matter of indifference so far as concerns the theory of agreement. But a quasi-contract is not a contract at all. The commonest sample of the class is the relation subsisting between two persons, one of whom has paid money to the other through mistake. The law, consulting the interests of morality, imposes an obligation on the receiver to refund, but the very nature of the transaction indicates that it is not a contract, inasmuch as the Convention, the most essential ingredient of Contract, is wanting. This word "quasi," prefixed to a term of Roman law, implies that the conception to which it serves as an index is connected with the conception with which the comparison is instituted by a strong superficial analogy or resemblance. It does not denote that the two conceptions are the same, or that they belong to the same genus. On the contrary, it negatives the notion of an identity between them; but it points out that they are sufficiently similar for one to be classed as the sequel to the other, and that the phraseology taken from one department of law may be transferred to the other, and employed without violent straining, in the statement of rules which would otherwise be imperfectly expressed. — *Maine, Ancient Law*, 4th ed., 343–4.

Strictly, Quasi-Contracts are acts done by one man to his own inconvenience for the advantage of another, but without the authority of the other, and, consequently, without any promise on the part of the other to indemnify him or reward him for his trouble.

Instances: *Negotiorum gestio*, in the Roman law; Salvage, in the English.

An obligation arises, such as would have arisen had the one party contracted to do the act, and the other to indemnify or reward. Hence the incident is called a "quasi-contract;" i. e. an incident, in consequence of which one person is obliged to another, *as if* a contract had been made between them.

The basis is, to incite to certain useful actions. If the principle were not admitted at all, such actions would not be performed so often as they are. If pushed to a certain extent, it would lead to inconvenient and impertinent intermeddling, with the view of catching reward. Whether it shall be admitted, or not, depends upon the nature of the act: — i. e. its general nature; since, without a general rule, the inducement would not operate, nor would the limitation to the principle be understood. Acts which come not within the rule, however useful in the particular instance, must be left to benevolence incited by the other sanctions.

But quasi-contract seems to have a larger import, — denoting any incident by which one party obtains an advantage he ought not to retain, because the retention would damage another; or by reason of which he ought to indemnify the other. The prominent idea in quasi-contract seems to be an undue advantage which would be acquired by the obligor, if he were not compelled to relinquish it or to indemnify. — 2 *Austin, Jurisprudence*, 4th ed., 944. — ED.

tract, be used indifferently to denote (1) the fictitious creation of the law spoken of above; (2) a true or actual but *tacit* contract, that is, one where a meeting of the minds or mutual understanding is inferred as matter of fact from circumstances, no words written or verbal having been used; and (3) that state of things where one is estopped by his conduct to deny a contract, although, in fact, he has not made or intended to make one, — it is not strange that confusion should result, and disputes arise where there is no difference of opinion as to the substance of the matter in controversy: whereas, were a different term applied to each, as, for example, that of legal duty to designate the first, contract, simply, to designate the second, and, contract by estoppel, the third, this difficulty would be avoided. It would of course come to the same thing, in substance, if the first were always called an implied contract, while the other two were otherwise designated in such way as to show distinctly what is meant. This is not always done, and an examination of our own cases would perhaps show that more or less confusion has arisen from such indiscriminate use of the term. A better nomenclature is desirable. But whatever terms are employed, it is indispensable that the distinction, which is one of substance, should be kept clearly in mind, in order that the principles governing in one class of cases may not be erroneously applied to another. See remarks of SMITH, J., in Bixby *v.* Moore,[1] and authorities cited at page 404.

Much may doubtless be said against supplying a remedy for the enforcement of a plain legal right "by so rude a device as a legal fiction" —[2] but, at this time of day, that is a matter for the consideration of the legislature rather than the courts. The remedy of *indebitatus assumpsit* can hardly be abolished in that large class of cases where it can only be sustained by resorting to a fiction until some other is furnished to take its place.

It by no means follows that this plaintiff is entitled to recover. In the first place, it must appear that the necessaries furnished to the defendant were furnished in good faith, and with no purpose to take advantage of her unfortunate situation. And upon this question, the great length of time which was allowed to pass without procuring the appointment of a guardian for her is a fact to which the jury would undoubtedly attach much weight. Its significance and importance must, of course, depend very much on the circumstances under which the delay and omission occurred, all of which will be for the jury to consider upon the question whether everything was done in good faith towards the defendant, and with an expectation on the part of the plaintiff's intestate that he was to be paid. Again: the jury are to consider whether the support for which the plaintiff now seeks to recover was not furnished as a gratuity, with no expectation or intention that it should be paid for, except so far as compensation might be derived from the use of the defendant's share of the farm. And, upon this point,

[1] 51 N. H. 402.

[2] Maine, Ancient Law, 26.

the relationship existing between the parties, the length of time the defendant was there in the family without any move on the part of Enoch F. Sceva to charge her or her estate, the absence (if such is the fact) of an account kept by him wherein she was charged with her support, and credited for the use and occupation of the land, — in short, all the facts and circumstances of her residence with the family that tend to show the intention or expectation of Enoch F. Sceva with respect to being paid for her support, are for the jury. Munger *v.* Munger;[1] Seavey *v.* Seavey;[2] Bundy *v.* Hyde.[3] If these services were rendered, and this support furnished, with no expectation on the part of Enoch F. Sceva that he was to charge or be paid therefor, this suit cannot be maintained; for then it must be regarded substantially in the light of a gift actually accepted and appropriated by the defendant, without reference to her capacity to make a contract, or even to signify her acceptance by any mental assent.

In this view, the facts stated in the case will be evidence for the jury to consider upon the trial; but they do not present any question of law upon which the rights of the parties can be determined by the court.

Case discharged.

THE PEOPLE *ex. rel.* CHARLES DUSENBURY, APPELLANT, *v.* GILBERT M. SPEIR AS JUSTICE, ETC., RESPONDENT.

IN THE COURT OF APPEALS OF NEW YORK, APRIL, 1879.

[*Reported in* 77 *New York Reports*, 144.]

APPEAL from order of the General Term of the Supreme Court, in the first judicial department, affirming upon *certiorari*, proceedings under the non-imprisonment act (chapter 300, Laws of 1831), by and before defendant as justice of the Supreme [Superior] Court, which resulted in the issuing of a warrant for the arrest of the relator.

The facts appear sufficiently in the opinion.

Hall & Blandy, for appellant.

D. M. Porter, for respondent.

DANFORTH, J. In the course of supplementary proceedings instituted by judgment and execution creditors of Selah Hiler, William S. Kiely was appointed receiver of the property, etc., of the judgment debtor, and as such commenced an action in the Superior Court of the city of New York, against Selah Hiler, Charles Dusenbury, George W. Lane, as chamberlain of the city of New York, and others. It appears from the complaint that at the time of his appointment there was an action pending in favor of Hiler against certain parties, in which a considerable sum of money had been obtained and placed in the hands of Lane as chamberlain, to the

[1] 33 N. H. 581. [2] 37 N. H. 125. [3] 50 N. H. 116.

credit of the action, and payment of the same to Hiler was forbidden by injunction; that afterwards Hiler, with the fraudulent intent of obtaining possession of the money, and preventing it from coming to the hands of his creditors, and with intent to violate the injunction order, claimed that the money had been previously assigned by him to Dusenbury, in trust for the benefit of certain creditors of Hiler; that Dusenbury, with knowledge of this injunction, induced Lane to pay the money to him as such trustee; that the assignment under which Dusenbury made the claim was fraudulent and void as against creditors, and the plaintiff as receiver; and the prayer was that the assignment be declared fraudulent and void, and the plaintiff have judgment against each defendant, payable out of the money received by him. Issue was joined, and the trial court found, and decided among other things, "that the defendants Hiler and Dusenbury, with the fraudulent intent and purpose of obtaining possession of said money, or of transferring and disposing of the same, and preventing it from coming to the hands of creditors, and with full knowledge of said injunction order, and with the intent to violate it, procured by fraud an order from the court, requiring the chamberlain to pay to Dusenbury as trustee the money so deposited with him. That it was so paid to him as trustee. That no assignment was in fact made to Dusenbury as trustee or otherwise; that he was not individually or as trustee entitled to it; that he wrongfully and fraudulently procured possession of the same, and judgment was entered as stated in the affidavit hereinafter referred to.

After the recovery of this judgment, the plaintiff upon the affidavit of his attorney, to which was attached a copy of the judgment roll in the action above referred to, applied to the respondent for a warrant for the arrest of the relator, under the provisions of the act of 1831 (chapter 300) "to abolish imprisonment for debt, and to punish fraudulent debtors." Upon the return of the warrant a hearing was had, and the relator discharged. The General Term of the Supreme Court reversed the determination of the magistrate, and upon a rehearing, the respondent, following the rulings of that court, convicted the relator, and he removed the proceedings to the Supreme Court, where they were affirmed, and from the order of that court the relator has appealed. The first question to be examined relates to the jurisdiction of the officer who issued the warrant. His authority in this case was not absolute. It depended upon the existence of certain facts. He was required by the statute from which he derived his authority to have proof of these facts, and the same statute declared that he should not issue a warrant without that proof, which is there prescribed, and thus made indispensable to the exercise of his authority. His jurisdiction, and its limitation depend upon the provisions of the act above referred to. Under those provisions, no person can lawfully be arrested or imprisoned on any civil process, issuing out of any court of law, or on any execution issuing out of any court of equity in any suit or pro-

ceeding instituted for the recovery of any money due upon any judgment or decree founded upon contract, or due upon any contract express or implied, or for the recovery of any damages for the non-performance of any contract. (Section 1.) But in such cases it is made "lawful for the plaintiff" who shall have obtained judgment against such person, to apply to any judge of the court in which such suit is brought for a warrant to arrest the defendant therein. (Section 3.) Then follow these words of prohibition: "No such warrant shall issue, unless satisfactory evidence be adduced to him by the affidavit of the plaintiff, or of some other person, that there is a debt or demand due to the plaintiff from the defendant, amounting to more than fifty dollars, and specifying the nature and amount thereof, as near as may be, for which the defendant according to the provisions of this act cannot be arrested or imprisoned," and establishing one or more particulars, which are specified, but which do not become at present, material in this inquiry. We are thus met at the outset with the question, whether the judgment, for the enforcement of which these proceedings were instituted, was founded upon contract, or resulted from a suit, which had for its cause of action a claim for damages for the non-performance of a contract. And this inquiry must be answered from the affidavit presented to the judge, and on which he based his warrant. The affidavit states the recovery of a judgment against the relator, in favor of the plaintiff, William S. Kieley, as receiver, etc., of Selah Hiler, for $3,627.91, but neither states the cause of action nor the nature of the indebtedness, nor that it was upon contract express or implied, nor any fact from which either of these conditions can be inferred. The affidavit however contains these words: "Deponent further says and charges, that he verily believes that the defendant Dusenbury neither had any title or right to the moneys received by him from the chamberlain of the city of New York, which is particularly mentioned in the judgment roll in which the judgment in favor of the plaintiff was recovered, and that he well knew that he had none, but that he obtained it in disobedience of the injunction restraining him from receiving the same, and by fraud and imposition on the Court of Common Pleas, which court made the order on which he obtained the money, and this statement is made upon the judgment roll in this action, and findings of fact contained in said judgment roll, and upon the documentary evidence put in evidence on the trial to obtain said judgment. Deponent further says the said judgment is wholly unpaid, and constitutes the foregoing indebtedness; and further says that for the said cause of action, the defendant by the first two sections of the act (above referred to) cannot be arrested or imprisoned, as deponent is advised and believes." The clause last cited states a mere inference of law, and that not the verified inference of the affiant, but his belief merely of the truth of advice given him. It is not enough. Latham *v.* Westervelt;[1]

[1] 26 Barb. 260.

Broadhead *v.* McConnell.[1] Every fact stated in the affidavit as to the cause of action, meagre as it is in facts, leads to an inference that there was no contract at the foundation of the action, nor any act or circumstance from which one could be inferred or implied. Indeed the facts charged indicate directly a cause of action resting in tort. That the defendant obtained the money without right or title, and that he well knew he had none, excludes the idea that he received it under a contract, and when we are told furthermore that he received the money in disobedience of an injunction order restraining him from receiving it, and then that he obtained it by fraud and imposition on the court, we perceive not only that there was no contract, but that there is no fact from which a contract can be implied, and that if the allegations are true, the cause of action was not one for which the defendant, according to the provisions of the statute, could not be arrested. Nor is there any fact stated in the judgment roll which aids or strengthens the affidavit. There is nothing in the complaint or findings to indicate that the cause of action was a contract express or implied, and upon the hearing before the respondent after the arrest of the defendant, he so held, saying: "In looking at the judgment roll it is plain that the warrant herein should not have been granted, for the defendant could have been arrested in that original action, and if so he cannot be prosecuted under "the act to abolish imprisonment for debt."

And the learned judge who delivered the opinion of the General Term upon the first review,[2] says: "The complaint in the receiver's action neither set forth in terms, nor in any manner alluded to any contract existing between himself or the judgment debtor, and the defendant Dusenbury, either as a basis of the liability desired to be enforced and maintained, or otherwise," but upholds the jurisdiction of the judge upon the ground that "from the facts, imperfectly stated in the complaint as they were, it could readily be seen that an implied contract existed in law for the payment of the moneys received by the defendant Dusenbury, to the receiver, in case he had no right to receive and hold them upon the ground claimed by him." We cannot agree with the learned judge in this construction of the statute. On the contrary we think that the express contract referred to in the statute is one which has been entered into by the parties, and upon which if broken an action will lie for damages, or is implied, when the intention of the parties, if not expressed in words, may be gathered from their acts and from surrounding circumstances; and in either case must be the result of the free and *bona fide* exercise of the will, producing the *aggregatio mentium*, the joining together of two minds, essential to a contract at common law. There is a class of cases where the law prescribes the rights and liabilities of persons who have not in reality entered into any contract at all with one another, but between whom circumstances have arisen which make it just that one should have a right,

[1] 3 Barb. 187. [2] 12 Hun, 70.

and the other should be subject to a liability, similar to the rights and liabilities in certain cases of express contract. Thus, if one man has obtained money from another, through the medium of oppression, imposition, extortion, or deceit, or by the commission of a trespass, such money may be recovered back, for the law implies a promise from the wrong-doer to restore it to the rightful owner, although it is obvious that this is the very opposite of his intention. Implied or constructive contracts of this nature are similar to the constructive trusts of courts of equity, and in fact are not contracts at all.[1] And a somewhat similar distinction is recognized in the civil law, where it is said: "In contracts it is the consent of the contracting parties which produces the obligation; in quasi-contracts there is not any consent. The law alone, or natural equity produces the obligation by rendering obligatory the fact from which it results. Therefore these facts are called quasi-contracts, because without being contracts, they produce obligations in the same manner as actual contracts."[2] And again at common law says Blackstone:[3] "If any one cheats me with false cards, or dice, or by false weights or measures, or by selling me one commodity for another, an action on the case lies against him for damages, upon the contract which the law implies that every transaction is fair and honest." So if money is stolen, its owner may sue the thief for conversion; doubtless he may sue him for money had and received to his use, but in either of these cases could it be claimed that the wrong-doer was within the protection of the act passed to abolish imprisonment for debt, or that the contract implied by law was the contract specified in the first section of that act? Surely not. And to that class the present case belongs. The court below expressly puts the obligation upon the mere authority of the law, and makes a contract "by force of natural equity." The learned judge

[1] Addison on Contracts, 22.

[2] 1 Poth. Ob. 113.

It remains to consider the development of *Indebitatus Assumpsit* as a remedy upon quasi-contracts, or, as they have been commonly called, contracts implied in law. The contract implied in fact, as we have seen, is a true contract. But the obligation created by law is no contract at all. Neither mutual assent nor consideration is essential to its validity. It is enforced regardless of the intention of the obligor. It resembles the true contract, however, in one important particular. The duty of the obligor is a positive one, that is, to act. In this respect they both differ from obligations, the breach of which constitutes a tort, where the duty is negative, that is, to forbear. Inasmuch as it has been customary to regard all obligations as arising either *ex contractu* or *ex delicto*, it is readily seen why obligations created by law should have been treated as contracts. These constructive duties are more aptly defined in the Roman law as obligations *quasi ex contractu* than by our ambiguous "implied contracts." (In Finch, Law, 150, they are called "as it were" contracts.) Quasi-contracts are founded (1) upon a record, (2) upon a statutory, official, or customary duty, or (3) upon the fundamental principle of justice that no one ought unjustly to enrich himself at the expense of another.— *Ames, The History of Assumpsit*, 2 *Harvard Law Review*, 63, 64. — Ed.

[3] 3 Bl. Com. 165.

says: "The law implied a promise to pay over, as the judgment directed that to be done." So obligations are created in consequence of frauds or negligence, and in either case the law compels reparation, and permits the tort to be waived, but there is no contract. That can only come from a convention or agreement of two, not by the option or at the election of one. In the case before us there is not even an election, for the complaint states no contract, nor charges any assumpsit.

It is also claimed by the respondent's counsel that inasmuch as the judgment declares the assignment under which the defendant claimed the money in question to be void, therefore Dusenbury must be deemed to have fraudulently incurred the obligation for which the action was brought, but that position is subject to the objection before mentioned; in that the debt or obligation spoken of in the act of 1831 means a contract resulting from the voluntary arrangement of the parties, and not one implied by law for the purpose of giving a remedy for a wrong suffered.

That the debt or obligation was fraudulently incurred is one of the particulars which, proved to exist, permits the judge to issue the warrant; but it must be remembered that in an action for the recovery of a debt, no arrest can be had, and it is mere evasion to say the defendant violated the injunction; imposed upon the court; made a claim under a fictitious assignment; and so, having wrongfully obtained the money, he refuses to pay it over, but the law says he ought to, therefore he shall be deemed to have promised, hence you may sue on that assumpsit, but you cannot arrest because the non-imprisonment act says you shall not in an action on contract. Therefore you set out in an affidavit the very frauds in consequence of which the law implied the contract, and demand the arrest of the defendant. It is very clear that an action for wrongs to persons, or to their property; actions of trover or trespass, or replevin, are not within the section, for they do not arise on contract. The party wronged cannot by waiving the tort make a contract, and then resort to the fact which constituted the tort as a ground of arrest. Fassett *v.* Tallmadge,[1] was an action similar to the one upon which these proceedings are based, to set aside a conveyance made by a debtor of the plaintiff to the defendant Tallmadge, on the ground that it was fraudulent and void as to creditors; it was so held, and the defendant was ordered to pay to a receiver appointed by the court a sum of money for the property received by him. In considering whether he was liable to be imprisoned, the court say: "The first section of the act to abolish imprisonment for debt, and the one hundred and seventy ninth section of the Code, fourth subdivision, are expressly confined in their operation to cases of contract, or in which the debt is contracted, or an obligation is incurred. Neither of them apply to a case like the present, where the action is a proceeding in equity to set aside a conveyance or assignment of personal property."

[1] 37 Barb. 436.

As the complaint stated no cause of action upon contract, and as the affidavit presented to the judge contained no statement or assertion tending to establish a contract express or implied as the basis of the judgment, but on the contrary an action to recover the fund on the ground of its unlawful appropriation or conversion by the defendant, showing misfeasance or malfeasance on his part, rather than a contract liability, the case is not within the statute.

Many other questions are raised by the appellant's points, but as the conclusion to which we have arrived in regard to the one above mentioned goes to the foundation of the proceedings, it is unnecessary to discuss them.

The order of the General Term should be reversed, and the warrant of Judge SPEIR for the arrest of the relator, dated 14th of November, 1876, and all subsequent proceedings thereunder, vacated and set aside.

All concur, except MILLER, J., absent at argument.

Ordered accordingly.

STATE OF LOUISIANA *ex rel.* FOLSOM *v.* MAYOR AND ADMINISTRATORS OF NEW ORLEANS.

IN THE SUPREME COURT OF THE UNITED STATES, NOVEMBER 19, 1883.

[*Reported in* 109 *United States Reports*, 285.]

Mandamus prayed for in the Supreme Court of Louisiana to the city authorities of New Orleans, to compel them to levy taxes and pay a judgment recovered by the relator. The prayer being denied, the decision was brought here on error for review, on the ground of repugnancy to the Constitution and laws of the United States. The facts appear in the opinion of the court.

Mr. *Thomas J. Semmes* for the plaintiffs in error.

Mr. *W. F. Morris* for the defendants in error.

Mr. Justice FIELD delivered the opinion of the court.

The relators are the holders of two judgments against the city of New Orleans, one for $26,850, the other for $2,000. Both were recovered in the courts of Louisiana; the first in June, 1877, by the relators; the second in June, 1874, by parties who assigned it to them. Both judgments were for damages done to the property of the plaintiffs therein by a mob or riotous assemblage of people in the year 1873. A statute of the State made municipal corporations liable for damages thus caused within their limits. Rev. Stats. of La., 1870, sect. 2453.

The judgments were duly registered in the office of the comptroller of the city, pursuant to the provisions of the act known as No. 5 of the extra session of 1870, and the present proceeding was taken by the relators

to compel the authorities of the city to provide for their payment. At the time the injuries complained of were committed, and one of the judgments was recovered, the city of New Orleans was authorized to levy and collect a tax upon property within its limits of one dollar and seventy-five cents upon every one hundred dollars of its assessed value. At the time the other judgment was recovered this limit of taxation was reduced to one dollar and fifty cents on every one hundred dollars of the assessed value of the property. By the Constitution of the State, adopted in 1879, the power of the city to impose taxes on property within its limits was further restricted to ten mills on the dollar of the valuation.

The effect of this last limitation is to prevent the relators, who are not allowed to issue executions against the city, from collecting their judgments, as the funds receivable from the tax thus authorized to be levied are exhausted by the current expenses of the city, which must first be met.

The relators sought in the State courts to compel a levy by the city of taxes to meet their judgments at the rate permitted when the damages were done for which the judgments were obtained. They contended that the subsequent limitation imposed upon its powers violated that clause of the federal Constitution which prohibits a State from passing a law impairing the obligation of contracts,[1] and also that clause of the Fourteenth Amendment which forbids a State to deprive any person of life, liberty, or property without due process of law. The supreme court of the State, reversing the lower court, decided against the relators, and the same contention is renewed here.

The right to reimbursement for damages caused by a mob or riotous assemblage of people is not founded upon any contract between the city and the sufferers. Its liability for the damages is created by a law of the legislature, and can be withdrawn or limited at its pleasure. Municipal corporations are instrumentalities of the State for the convenient administration of government within their limits. They are invested with authority to establish a police to guard against disturbance; and it is their duty to exercise their authority so as to prevent violence from any cause, and particularly from mobs and riotous assemblages. It has, therefore, been generally considered as a just burden cast upon them to require them to make good any loss sustained from the acts of such assemblages which they should have repressed. The imposition has been supposed to create, in the holders of property liable to taxation within their limits, an interest to discourage and prevent any movements tending to such violent proceedings. But, however considered, the imposition is simply a measure of legislative policy, in no respect resting upon contract, and subject, like all other measures of policy, to any change the legislature may see fit to make, either in the extent of the liability or in the means of its enforcement. And its character is not at all changed by the fact that the amount of loss,

[1] Only so much of the opinion is given as relates to this question. — Ed.

in pecuniary estimation, has been ascertained and established by the judgments rendered. The obligation to make indemnity created by the statute has no more element of contract in it because merged in the judgments than it had previously. The term "contract" is used in the Constitution in its ordinary sense, as signifying the agreement of two or more minds, for considerations proceeding from one to the other, to do, or not to do, certain acts. Mutual assent to its terms is of its very essence.

A judgment for damages, estimated in money, is sometimes called by text writers a specialty or contract of record, because it establishes a legal obligation to pay the amount recovered; and, by a fiction of law, a promise to pay is implied where such legal obligation exists. It is on this principle that an action *ex contractu* will lie upon a judgment.[1] But this fiction cannot convert a transaction wanting the assent of parties into one which necessarily implies it. Judgments for torts are usually the result of violent contests, and, as observed by the court below, are imposed upon the losing party by a higher authority against his will and protest. The prohibition of the federal Constitution was intended to secure the observance of good faith in the stipulation of parties against any State action. Where a transaction is not based upon any assent of parties, it cannot be said that any faith is pledged with respect to it; and no case arises for the operation of the prohibition. Garrison *v.* City of New York.[2] There is, therefore, nothing in the liabilities of the city by reason of which the relators recovered their judgments that precluded the State from changing the taxing power of the city, even though the taxation be so limited as to postpone the payment of the judgments.

Judgment affirmed.[3]

Mr. Justice HARLAN dissenting.

By the Constitution of Louisiana adopted in 1879, and which went into effect January 1st, 1880, it is declared "no parish or municipal tax, for all purposes whatever, shall exceed ten mills on the dollar of valuation."

The judgments held by plaintiff in error against the city of New Orleans were rendered and became final long before the adoption of that constitutional provision. At the time of their rendition, the law forbade execution against the defendant, but the city had the power, and was under a duty, which the courts could compel it to discharge, to include in its budget or annual estimate for contingent expenses, a sum sufficient to pay these judgments. At that time, also, the rate of taxation prescribed by law was ample to enable the city to meet all such obligations. But if the limitation upon taxation imposed by the State Constitution be applied to the judgments in question, then, it is conceded, the city cannot raise more money than will be required to meet the ordinary and necessary expenses of municipal administration. Consequently under the limit of ten mills on

[1] Chitty on Contracts, Perkins' Ed. 87. [2] 21 Wall. 203.

[3] Mr. Justice BRADLEY delivered a concurring opinion. — ED.

the dollar of valuation, the judgments of plaintiffs become as valueless as they would be, had the State Constitution, in terms, forbidden the city from paying them.

1. Are the judgments in question contracts?[1] This question is answered by the Court of Appeals of New York, speaking by WOODRUFF, J., in Taylor *v.* Root.[2] It is there said: —

"Contracts are of three kinds: Simple contracts, contracts by specialty, and contracts of record. A judgment is a contract of the highest nature known to the law. . . . The cause or consideration of the judgment is of no possible importance; that is merged in the judgment. When recovered, the judgment stands as a conclusive declaration that the plaintiff therein is entitled to the sum of money recovered. No matter what may have been the original cause of action, the judgment forever settles the plaintiff's claim and the defendant's assent thereto; this assent may have been reluctant, but in law it is an assent, and the defendant is estopped by the judgment to dissent. Forever thereafter, any claim on the judgment is setting up a cause of action on contract."

Blackstone says that "when any specific sum is adjudged to be due from the defendant to the plaintiff on an action or suit at law, this is a contract of the highest nature, being established by the sentence of a court of judicature."[3] Chitty enumerates judgments among contracts or obligations of record, and observes that they "are of superior force, because they have been promulgated by, or are founded upon, the authority and have received the sanction of a court of record."[4] An action in form *ex contractu* will lie on a judgment of a court of record, because the law implies a contract to pay it from the fact of there being a legal obligation to do so, "although," says Chitty, "the transaction in its origin was totally unconnected with contract, and there has been no promise in fact."[5]

It seems to me that these judgments are contracts, within any reasonable interpretation of the contract clause of the national Constitution. It can hardly be that the framers of that instrument attached less consequence to contracts of record than to simple contracts. If this view be correct, then the withdrawal from the city of New Orleans of the authority which it possessed when they were rendered, to levy taxes sufficient for their payment, impaired the obligation of the contracts evidenced by those judgments.

[1] Only so much of the opinion is given as relates to this question. — ED.

[2] 4 Keyes, 344. [3] 3 Bl. Com. 465. [4] Chitty on Contracts, 3.

[5] Id. 87.

INHABITANTS OF MILFORD *v.* COMMONWEALTH.

In the Supreme Judicial Court of Massachusetts, February 26 1887.

[*Reported in* 144 *Massachusetts Reports*, 64.]

Petition to the Superior Court, under the Pub. Stats. c. 195, to recover for the support of Susan Touhey, alleged to have been a State pauper, who fell into distress in Milford, and who was not able to be removed to the State almshouse.

At the trial before Knowlton, Mason, and Barker, JJ., the petitioner's evidence tended to show that said Susan was a State pauper, and that she was in need of relief, and was properly supported by the petitioner, under the provisions of the Pub. Stats. c. 86, § 25, at the cost stated in the account annexed to the petition.

The court found as a fact that no express contract was made by the respondent for the board of the pauper named in the petition, but that whatever was said by the agent of the Commonwealth was with reference merely to the amount of the allowance to be made, under the statute, upon the bills of the town of Milford, presented in accordance with the provisions of the Pub. Stats. c. 86, § 26.

The court ruled, as matter of law, that the claim of a town for reimbursement under said § 26 was not a claim founded upon contract for the payment of money, within the meaning of the Pub. Stats. c. 195, § 1; and found for the respondent. The petitioner alleged exceptions.

S. H. Tyng, for the petitioner.

H. N. Shepard, Assistant Attorney General, for the Commonwealth.

Field, J. The question of law to be decided is whether the claim that the Commonwealth reimburse to the town the expenses incurred in the support of a State pauper, under the Pub. Stats. c. 86, §§ 25, 26, is a claim which is founded upon a contract for the payment of money, within the meaning of the Stat. of 1879, c. 255 (Pub. Stats. c. 195). See Stats. 1865, c. 162; 1869, c. 12; 1879, c. 291, § 3.

The Court of Claims of the United States, under statutes which give it jurisdiction to hear and determine "all claims founded upon any law of Congress, . . . or upon any contract, expressed or implied, with the government of the United States," &c., has heard and determined claims for salaries or pay established by a law of the United States, and these have been sometimes spoken of as claims founded on contract, although it is not clear that they ought not to be regarded as claims founded upon a law of the United States. U. S. Rev. Stats. § 1059. Patton *v.* United States;[1]

[1] 7 Ct. of Cl. 362, 371.

French *v.* United States;[1] Collins *v.* United States;[2] Mitchell *v.* United States;[3] United States *v.* Langston.[4]

In matters of procedure, penalties have usually been regarded as debts. In the Pub. Stats. c. 167, § 1, actions for penalties are excluded from actions of contract, and are included in actions of tort, but actions under statutes to recover for money expended have usually been actions of contract. New Salem *v.* Wendell;[5] Oakham *v.* Sutton;[6] Amherst *v.* Shelburne;[7] Wenham *v.* Essex.[8]

The law regards the money as expended at the implied request of the defendant, and a promise to pay the money is said to be implied from the liability created by the statute. A contract may be expressly made, or a contract may be inferred or implied when it is found that there is an agreement of the parties and an intention to create a contract, although that intention has not been expressed in terms of contract; in either case, there is an actual contract. But a contract is sometimes said to be implied when there is no intention to create a contract, and no agreement of parties, but the law has imposed an obligation which is enforced as if it were an obligation arising *ex contractu*. In such a case, there is not a contract, and the obligation arises *ex lege*.

We are of opinion that the Stat. of 1879, c. 255, was not intended to give to the Superior Court jurisdiction over obligations for the payment of money imposed by statute upon the Commonwealth. There are many such obligations, but they are not within any of the definitions of a contract, all of which require a consent or agreement of the parties. These statutory obligations are performed by the various officers of the Commonwealth, or by the Legislature. In one case, at least, there is a remedy by a petition in the nature of a petition of right, to be filed in the Supreme Judicial Court. Pub. Stats. c. 13, § 64. In most cases, however, no judicial remedy against the Commonwealth has been provided, and the Commonwealth cannot be sued in its own courts without clear statutory authority.

We think that the Pub. Stats. c. 195, must be confined to actual contracts made by the Commonwealth for the payment of money, and we are not now required to determine whether they must be express contracts.

Exceptions overruled.

[1] 16 Ct. of Cl. 419. [2] 15 Ct. of Cl. 22.
[3] 18 Ct. of Cl. 281; s. c. 109 U. S. 1 [4] 118 U. S. 389.
[5] 2 Pick. 341. [6] 13 Met. 192 [7] 11 Gray, 107 [8] 103 Mass. 117.

SECTION II.

WHEREIN IT DIFFERS FROM TORT.

PERKINSON *v.* GILFORD AND OTHERS.

In the King's Bench, Easter Term, 1640.

[*Reported in Croke, Charles,* 539.]

Debt against Gilford and others, executors of William Collier, Esq., late sheriff of the county of Dorset, for two and twenty pounds ten shillings. Whereas the plaintiff had recovered in the Common Pleas against the executor of William Pawlett a debt of one hundred pounds, and two and twenty pounds ten shillings for damages, the debt and damages *de bonis testatoris, si, &c.; et si non,* the said two-and-twenty pounds ten shillings *de bonis propriis;* and the record being removed into this court, the plaintiff had a *fieri facias* directed to the said William Collier, sheriff of Dorset, for the levying of the said two-and-twenty pounds ten shillings damages of the goods of the said executor: and by virtue thereof he levied the said two-and-twenty pounds ten shillings, and afterwards died without paying, &c.; whereupon he demanded it of the said executors, and they had not paid it, *per quod actio accrevit.* The defendants pleaded *non debet;* and found against them.

Mallet moved in arrest of judgment,

The Fourth Objection,[1] That although the action lies against the sheriff himself, yet it lies not against his executors; for the non-payment is a personal wrong, wherewith his executors are not chargeable, as debt upon an escape lies not against a sheriff's executors.

But Berkley, Jones, and myself (Brampston being absent) agreed, that the action well lies. And for the fourth objection they held, that the sheriff's executors are as well chargeable as himself: for, as Jones said, there is a diversity where the sheriff is chargeable in his life for a personal tort or misfeasance; there his person is only chargeable, and there *actio moritur cum persona:* but where he is chargeable for levying of money, and not paying it over, that is for a duty; and there, if he dies, his executors are chargeable as well as himself; which is the reason, that for an escape by the sheriff his executors are not chargeable: but there would be great mischief if the sheriff's executors should not be liable in this case; for the plaintiff had a duty due to him from the executors of Pawlett the first

[1] Only so much of the case is given as relates to this objection. — Ed.

defendant, who paid it to the sheriff, and thereby was discharged thereof: and if the plaintiff should not recover it against the sheriff's executors, he should be without remedy, which the law will not suffer. Wherefore they all agreed, that the action well lay. And rule was given to have judgment entered, unless, &c.

HAMBLY and Another, Assignees of MOON *v.* TROTT, Administrator.

In the King's Bench, Hilary Term, 1676.

[*Reported in Cowper*, 371.]

In trover against an administrator *cum testamento annexo*, the declaration laid the conversion by the testator in his lifetime. Plea, that the testator was not guilty. Verdict for the plaintiff.

Mr. *Kerby* had moved in arrest of judgment upon the ground of this being a personal tort, which dies with the person; upon the authority of Collins *v.* Fennerell,[1] and had a rule to shew cause.

Mr. *Buller* last term shewed cause. — The objection made to the plaintiff's title to recover in this case is founded upon the old maxim of law which says, *actio personalis moritur cum persona*. But that objection does not hold here; nor is the maxim applicable to all personal actions; if it were, neither debt nor assumpsit would lie against an executor or administrator. If it is not applicable to all personal actions, there must be some restriction; and the true distinction is this; where the action is founded merely upon an injury done to the person, and no property is in question, there the action dies with the person, as in assault and battery, and the like. But where property is concerned, as in this case, the action remains notwithstanding the death of the party.

Trover is not like trespass, but lies in a variety of cases where a party gets the possession of goods lawfully. It is founded solely in property, and the value of the goods only can be recovered. Therefore, the damages are as certain as in any action of assumpsit. As to the case of Collins *v.* Fennerell, it is a single authority and was not argued; therefore, most probably was determined simply on the old maxim. But Savile 40, case 90, is directly the other way.

Where the damages are merely vindictive and uncertain, an action will not lie against an executor; but where the action is to recover property, there the damages are certain, and the rule does not hold. This is an action for sheep, goats, pigs, oats, and cyder converted by injustice to the use of the person deceased; therefore, this action does not die with the person.

[1] Trin. 22, 23, Geo. 2, B. R.

Mr. *Kerby contra* for the defendant cited Carter *v.* Fossett,[1] where JONES, Justice, said, "that when the act of the testator includes a tort, it does not extend to the executor; but being personal dies with him; as trover and conversion does not lie against an executor for trover *fait par luy.*" Collins *v.* Fennerell, above cited.

Here, the goods came to the hands of the testator, and he converted them to his own use. Trover is an action of tort, and conversion is the gist of the action. No one is answerable for a tort but he who commits it; consequently this action can only be maintained against the person guilty of such conversion. But here the conversion is laid to be by the testator. Therefore the judgment must be arrested. The distinction that has been taken in the books is, that the action may be maintained by an executor but not against him. Hughes *v.* Robotham ; Le Mason *v.* Dixon.[3]

Lord MANSFIELD. If this case depends upon the rule, *actio personalis moritur cum persona*, at present only a *dictum* has been cited in support of the argument. Trover is in form a tort, but in substance an action to try property.

Mr. *Kerby.* The executor is answerable for all contracts of the testator, but not for torts.

Lord MANSFIELD. The fundamental point to be considered in this case is, whether if a man gets the property of another into his hands it may be recovered against his executors in the form of an action of trover, where there is an action against the executors in another form. It is merely a distinction whether the relief shall be in this form or that. Suppose the testator had sold the sheep, etc., in question; in that case an action for money had and received would lie. Suppose the testator had left them in specie to the executors, the conversion must have been laid against the executors. There is no difficulty as to the administration of the assets, because they are not the testator's own property. Suppose the testator had consumed them, and had eaten the sheep; what action would have lain then? Is the executor to get off altogether? I shall be very sorry to decide that trover will not lie, if there is no other remedy for the right.

ASTON, Justice. Suppose the executor had had a counter demand against the plaintiff, he could not have set it off in trover; but in an action for money had and received, he might. If these things had been left by the testator in specie, the conversion must have been laid to be by the executor. There seems to be but little difference between actions of trover and actions for money had and received. As at present advised, I incline to think trover maintainable in this case.

ASHHURST, Justice. The maxim does not hold as a universal proposition, because assumpsit lies. As to the case of Collins *v.* Fennerell, all the court considered it as unargued, and given up rather prematurely by Mr. *Henley.*

Lord MANSFIELD. The criterion I go upon is this: Can justice possibly

[1] Palm. 330. [2] Popham, 31. [3] Popham, 139.

be done in any other form of action? Trover is merely a substitute of the old action of detinue.[1] The court ordered it to stand over.

Upon a second argument this day, Mr. *Dunning* cited Cro. Car. 540; 1 Sid. 88.

Lord MANSFIELD. Many difficulties arise worth consideration. An action of trover is not now an action *ex maleficio*, though it is so in form; but it is founded in property. If the goods of one person come to another, the person who converts them is answerable. In substance, trover is an action of property. If a man receives the property of another, his fortune ought to answer it. Suppose he dies, are the assets to be in no respect liable? It will require a good deal of consideration before we decide that there is no remedy.

ASTON, Justice. The rule is, *quod oritur ex delicto, non ex contractu* shall not charge an executor.[2] Executors and administrators.[3] Where goods come to the hands of the executor in specie, trover will lie; where in value, an action for money had and received. But the difficulty with me is, that here it does not appear whether the goods came to the hands of the defendant in specie or in value.

Cur. advisare vult.

Afterwards, on Monday, February 12th, in this term, Lord MANSFIELD delivered the unanimous opinion of the court as follows: —

This was an action of trover against an administrator, with the will annexed. The trover and conversion were both charged to have been committed by the testator in his lifetime; the plea pleaded was, that the testator was not guilty. A verdict was found for the plaintiffs, and a motion has been made in arrest of judgment, because this is a tort, for which an executor or administrator is not liable to answer.

The maxim, *actio personalis moritur cum persona*, upon which the objection is founded, not being generally true, and much less universally so, leaves the law undefined as to the kind of personal actions which die with the person, or survive against the executor.

An action of trover being in form a fiction, and in substance founded on property, for the equitable purpose of recovering the value of the plaintiff's specific property, used and enjoyed by the defendant, if no other action could be brought against the executor, it seems unjust and inconvenient that the testator's assets should not be liable for the value of what belonged to another man, which the testator had reaped the benefit of.

We therefore thought the matter well deserved consideration. We have carefully looked into all the cases upon the subject. To state and go through them all would be tedious, and tend rather to confound than elucidate. Upon the whole, I think these conclusions may be drawn from them.

[1] 2 Keb. 502; Ventr. 30; Sir T. Raym. 95.

[2] 2 Bac. Abr. 444, 445. tit.

[3] 2 Bac. Abr. 280. tit. Trover.

First, as to actions which survive against an executor, or die with the person, on account of the *cause* of action. Secondly, as to actions which survive against an executor, or die with the person, on account of the *form* of action.

As to the first; where the cause of action is money due, or a contract to be performed, gain or acquisition of the testator by the work and labor or property of another, or a promise of the testator express or implied; where these are the causes of action, the action survives against the executor. But where the cause of action is a tort, or arises *ex delicto*, as is said in Hole *v.* Blandford,[1] supposed to be by force and against the King's peace, there the action dies, — as battery, false imprisonment, trespass, words, nuisance, obstructing lights, diverting a water-course, escape against the sheriff, and many other cases of the like kind.

Secondly, as to those which survive or die, in respect of the form of action. In some actions the defendant could have waged his law; and therefore, no action in that form lies against an executor. But now other actions are substituted in their room upon the very same cause, which do survive and lie against the executor. No action where in form the declaration must be *quare vi et armis, et contra pacem*, or where the plea must be, as in this case, that the testator was not guilty, can lie against the executor. Upon the face of the record, the cause of action arises *ex delicto*, and all private criminal injuries or wrongs, as well as all public crimes, are buried with the offender.

But in most, if not in all the cases where trover lies against the testator, another action might be brought against the executor which would answer the purpose. An action on the custom of the realm against a common carrier is for a tort and supposed crime; the plea is not guilty; therefore, it will not lie against an executor. But assumpsit, which is another action for the same cause, will lie. So if a man take a horse from another, and bring him back again, an action of trespass will not lie against his executor, though it would against him; but an action for the use and hire of the horse will lie against the executor.

There is a case in Sir Thomas Raymond, 71,[2] which sets this matter in a clear light: There, in an action upon the case, the plaintiff declared, "that he was possessed of a cow, which he delivered to the testator, Richard Bailey, in his lifetime, to keep the same for the use of him, the plaintiff; which cow the said Richard afterwards sold, and did convert and dispose of the money to his own use; and that neither the said Richard in his life, nor the defendant after his death, ever paid the said money." Upon this state of the case, no one can doubt but the executor was liable for the value. But the special injury charged obliged him to plead that the testator was not guilty. The jury found him guilty. It was moved in arrest of judgment, because this is a tort for which the executor is not liable to

[1] Sir T. Raym. 57. [2] Bailey *v.* Birtles *et uxor*, executrix of Richard Bailey.

answer, but *moritur cum persona*. For the plaintiff it was insisted, that though an executor is not chargeable for a misfeasance, yet for a non-feasance he is; as for non-payment of money levied upon a *fieri facias*, and cited Cro. Car. 539; 9 Co. 50 b, where this very difference was agreed; for non-feasance shall never be *vi et armis*, nor *contra pacem*. But notwithstanding this the court held "it was a tort, and that the executor ought not to be chargeable." Sir Thomas Raymond adds, "*vide* Saville 40, a difference taken." That was the case of Sir Henry Sherrington, who had cut down trees upon the Queen's land, and converted them to his own use in his lifetime. Upon an information against his widow, after his decease, Manwood, Justice, said, "In every case where any price or value is set upon the thing in which the offence is committed, if the defendant dies his executor shall be chargeable; but where the action is for damages only, in satisfaction of the injury done, there his executor shall not be liable." These are the words Sir Thomas Raymond refers to.

Here therefore is a fundamental distinction. If it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer, as beating or imprisoning a man, etc., there the person injured has only a reparation for the *delictum* in damages to be assessed by a jury. But where, besides the crime, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. As for instance, the executor shall not be chargeable for the injury done by his testator in cutting down another man's trees, but for the benefit arising to his testator for the value or sale of the trees he shall.

So far as the tort itself goes, an executor shall not be liable; and therefore it is, that all public and all private crimes die with the offender, and the executor is not chargeable; but so far as the act of the offender is beneficial, his assets ought to be answerable; and his executor therefore shall be charged.

There are express authorities that trover and conversion does not lie against the executor; I mean, where the conversion is by the testator. Sir William Jones, 173–4.[1] There is no saying that it does.

The form of the plea is decisive, viz., that the testator was not guilty; and the issue is to try the guilt of the testator. And no mischief is done: for so far as the cause of action does not arise *ex delicto* or *ex maleficio* of the testator, but is founded in a duty which the testator owes the plaintiff, upon principles of civil obligation, another form of action may be brought, as an action for money had and received. Therefore, we are all of opinion that the judgment must be arrested.

Judgment arrested.

[1] Palm. 330.

POWELL, HUGHES, AND PROTHERO *v.* REES, ADMINISTRATRIX OF JOHN REES.

IN THE QUEEN'S BENCH, MICHAELMAS TERM, 1837.

[*Reported in* 7 *Adolphus & Ellis*, 426.]

ASSUMPSIT for money had and received by the intestate to the use of the plaintiffs, and on an account stated between the intestate and the plaintiffs; with promise by the intestate. Plea *non assumpsit*, with another plea not material here.

On the trial, before COLERIDGE, J., at the last Monmouthshire assizes, the facts (so far as material to the point here reported) were as follows. The intestate had been lessee under the plaintiffs of certain coal mines; the minerals under three closes had been excepted from the demise, but he had worked them, brought the coals to the market, and received the produce. The plaintiffs had sued the defendant in trespass, after the intestate's death, and recovered damages for the coals abstracted within the six months next preceding that event, availing themselves of the remedy given by Stat. 3 & 4 W. 4, c. 42, s. 2. The present action was brought to recover damages for the proceeds of the sales of coals by the intestate from under the excepted closes, for the period antecedent to the six months before mentioned. No direct evidence of the amount obtained by the intestate for the coals was given. It appeared that they had been mixed with coals taken from the mines demised, and all sold together. The plaintiffs relied on the evidence of surveyors as to the quantity of coal which had been excavated. The defendant's counsel objected that the action did not survive against the administratrix under these circumstances; and that, at any rate, the action of trespass which had been brought was inconsistent with the present action. The learned judge reserved leave to the defendant to move for a nonsuit; and the plaintiff had a verdict for the sum which the jury considered to be the value of the coal taken, deducting for the expense of raising and conveying it to market.

Talfourd, Serjt., now moved according to the leave reserved. The first question is, whether, generally, money had and received can be maintained against an administrator upon such a tort committed by the intestate, or whether it be a personal action which expires with the person. It is true that in many instances of tort the party injured is permitted to waive the tort, and to proceed for the money obtained by the tort-feasor, affirming his act. This point is discussed in Hambly *v.* Trott.[1] But here there was no evidence of the actual price, which seems necessary to the action for money had and received. Harvey *v.* Archbold.[2] Again, this was, substantially, an

[1] 1 Cowp. 371.

[2] 3 B. & C. 626.

action for an injury to the freehold; and it has never been held that such injuries can be treated as contracts. The Statute 3 & 4 W. 4, c. 42, s. 2, seems to show that the legislature considered trespass to be the only remedy; otherwise the provision there would have been unnecessary. Secondly, the plaintiffs, by proceeding under the statute, have elected to treat the act of the intestate as a trespass. They cannot now waive the tort; and, if not, they cannot bring the action for money had and received, which assumes that the act of the tort-feasor is affirmed.

Cur. adv. vult.

Lord DENMAN, C. J., in this term (November 9th), delivered the judgment of the Court.

In this case, we disposed of one ground, on which a rule for entering a nonsuit was sought to be obtained, upon the hearing. It remains to decide upon another, which arose under the following circumstances. (His Lordship then stated the facts, as at p. 35, *ante*.)

It was objected, in the first place, generally, that no such action was maintainable; that the foundation of it was a tort, the remedy for which died with the person; and that the doctrine of waiving the tort and suing upon a contract implied by law could not be extended to a case in which no remedy by action in tort existed to be waived. We were pressed, too, by the remark that such an action was of the first impression, and by the inference to be drawn from the language of the section above mentioned, and from the remedy there given. If, however, the legal principles upon which the action is maintainable are clear, these considerations ought not to prevail. In the present case the money which has been produced by the sale of that which had been wrongfully severed from the plaintiffs' estate, and converted into chattels, is traced into the pocket of the intestate: it cannot be doubted that an action for money had and received would have been maintainable against him for that money. His personal estate has come to the hands of the defendant, by so much increased; and we cannot see any grounds why the same action is not to be maintained against her who represents him in respect of that estate.

In the case of Hambly *v.* Trott,[1] Lord MANSFIELD very fully considers this subject, and lays down the distinctions which arise, as to the surviving of remedies, upon the cause of action, and the form of action. He observes[2] that there "is a fundamental distinction. If it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer, as beating or imprisoning a man, &c., there the person injured has only a reparation for the *delictum* in damages to be assessed by a jury. But where, besides the crime, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. As, for instance, the executor shall not be chargeable for the injury done by his testator in cutting down another man's trees, but for

[1] 1 Cowp. 371. [2] 1 Cowp. 376.

the benefit arising to his testator for the value or sale of the trees he shall." The former part of this example illustrates the operation of the recent statute; in the latter, which is the present case, it was not needed.

But it was pressed on us, secondly, that, at all events, this action was not maintainable after recourse had been had to the statute first referred to; for that the plaintiffs, having elected to proceed for damages for the trespass in part, could not split it and sue in contract for the other part. The conduct of the plaintiffs may have been vexatious; but that furnishes no legal answer to this action, because, in truth, the intestate was guilty of a series of trespasses, and not of one single wrongful act. The plaintiffs, therefore, have only pursued different remedies for different injuries: they might indeed have recovered a compensation for all under the present form of proceeding, but they were not bound to do so.

Upon the whole there must be no rule. *Rule refused.*

Ex parte ADAMSON. *In re* COLLIE.

IN THE COURT OF APPEAL, July 4, 1878.

[*Reported in Law Reports* 8 *Chancery Division*, 807.]

THIS was an appeal from a decision of Mr. Registrar Murray, acting as Chief Judge in Bankruptcy, rejecting a proof for £120,197 10*s.* 11*d.*, tendered by John Adamson against each of the separate estates of Alexander and William Collie, partners, who were adjudicated bankrupts on the 19th of August, 1875.

A. and W. Collie were merchants trading in London and at Manchester, under the firm of Alexander Collie & Co. In the year 1872 Adamson arranged with the firm to enter with them into speculations in the purchase and sale of cotton on joint account, for which purpose he was to supply the requisite capital by accepting bills of exchange drawn upon him by them. Adamson was to receive half the net proceeds of the ventures. This arrangement was carried out, and he from time to time accepted bills to a large amount, which were discounted by the firm. The bills were renewed from time to time. The firm from time to time wrote to Adamson, sending him accounts of purchases and sales of cotton on the joint account. On the 15th of June, 1875, the firm stopped payment, and immediately after this Adamson discovered that the alleged purchases of cotton on the joint account were almost entirely, if not entirely, fictitious, and that no cotton, or at any rate a very small quantity, had ever been purchased on that account, and Alexander Collie confessed that he had deceived him. After the stoppage of the firm Adamson was compelled to pay his acceptances when they

matured, and his proof of £120,197 10*s.* 11*d.* was for the moneys which he had thus paid.[1]

July 4. JAMES, L. J., delivered the judgment of himself and BAGGALLAY, L. J., as follows: —

There are two questions to be decided in this case. The first is, whether Mr. Adamson, the appellant, is to be allowed, after proving against the joint estate and receiving a dividend on that proof, to prove against the separate estates, withdrawing his joint proof and returning what he has received.[2]

The second question, therefore, remains to be considered, Has he that right? The counsel for the respondent having contended that Mr. Adamson must be taken to have knowingly elected between two alternative rights which he must be taken to have known, next argued that he had no right of proof against the separate estates of the partners. The ground for the separate proof is this: Mr. Adamson was induced to accept bills of exchange for a very large amount, on the representation that they were bills or renewals of bills representing the purchase-money of large quantities of cotton, stated to have been purchased on the joint account of Mr. Adamson and the two Collies, and continued to be held by them on such joint account. This representation was wholly, or almost wholly, fictitious, and there is no doubt that Mr. Adamson was cheated out of the acceptances which he gave, and which he had to meet when they matured. That Alexander Collie was guilty of the frauds there is no dispute, and, in the absence of evidence to explain his part of the transaction, it is impossible not to hold that William Collie, who himself signed letters and accounts constituting the false representations of the fictitious cotton dealings, must be held to have been aware that he was lending himself to his brother's frauds. There was, therefore, a fraud practised on Mr. Adamson in which both the Collies were participators. And it has always been held in the Court of Chancery that for a fraud, as for a breach of trust, each participator is liable *in solido*. Some doubt was, however, suggested in the course of the argument whether proof could be made in bankruptcy for a fraud any more than for other torts. A great many cases — if cases were necessary — show that proofs have been allowed in bankruptcy for fraud, and on the ground of fraud only, where on a mere breach of contract they would not have been admitted. A notable instance of this is in the proof allowed in Read *v.* Bailey,[3] by the joint estate against the separate estate for moneys fraudulently abstracted from the partnership assets, a decision which only followed a whole line of recognized authorities. But, in truth, the proof is not for the fraud or for the tort. The Court of Chancery never

[1] So much of the statement of facts as relates to the plaintiff's having elected to prove against the joint estate has been omitted. — ED.

[2] So much of the opinion as relates to the question of election has been omitted. — ED.

[3] 3 App. Cas. 94.

entertained a suit for damages occasioned by fraudulent conduct or for breach of trust. The suit was always for an equitable debt or liability in the nature of debt. It was a suit for the restitution of the actual money or thing, or value of the thing, of which the cheated party had been cheated. If a man had been defrauded of any money or property and the cheater afterwards became bankrupt, if the money could be earmarked, or if the thing could be found in specie, or traced, the assignees or trustees were made to give it back, or if it could not be earmarked or traced, then proof was allowed against the estate. It was a very common thing to have a suit against solvent persons and the assignees of a bankrupt, to set aside transactions as fraudulent, and to have a decree against the solvent persons, and a declaration of a right of proof against the estate of the bankrupt. This was done as a matter of course in the case of Phosphate Sewage Company *v.* Hartmont.[1] In cases of fraud, or breach of trust, which is often only one form and instance of fraud, there never was any division of liability between the tort-feasors; every person participating in the tort was liable to make good the whole; the liability of each in equity was for the whole amount. And the proof in bankruptcy was exactly commensurate with that liability; it being the established rule in bankruptcy that every debt which a person could, either in his own name or in the name of any other person, recover at law or in equity, was a provable debt in bankruptcy. It is said in the books that debts due by reason of fraud or breach of trust are joint and several. There is here a slight inaccuracy. Of course tort-feasors may be sued all in one action, or in several actions, but there is not really or practically any joint liability as distinct from the several liability, except where there is a partnership and a joint estate. It is a mere accident, but a frequent accident, that the fraud is connected with a partnership, but where it is, the result often is that the partnership in its joint character is liable for it. If the profits or proceeds of the fraud found their way into the partnership, then on that ground the partnership became indebted for them, or if the fraud was in the course of the partnership business, and was practised by one of the partners on a client or customer of the firm, then the firm — however innocent the other partners may have been, and although the guilty partner alone stole the plunder — was held liable to make full restitution to the defrauded client or customer. But this right to go against the partnership assets did not relieve the guilty party or parties of his or their personal and separate liability by reason of his or their actual participation. If in a partnership of A., B., C., and D., and in a partnership matter, A. and B. shared in a fraud upon a customer, they would be severally liable, and the joint estate would be liable to make restitution; but not the separate estates of C. and D. And the rule about joint and several liability must be read with this qualification; but, so qualified, the rule is a well-established rule. And, according to this rule, Mr. Adamson was

[1] 5 Ch. D. 394.

not entitled to go against the joint estate and the separate estates, but had to make his election. It is not too late for him now to elect, and it must therefore be declared that he is entitled to prove against the separate estates of Alexander and William Collie in respect of the bills which he was induced to accept by their fraud; but he must withdraw his proof from the joint estate and refund the dividend accordingly, and it must be referred back to the Registrar to ascertain the amount on the footing of this declaration. Under the circumstances, the proper order as to costs will be to allow him to add his costs in the Court below and here to the amount of his proofs against the separate estates.

BRAMWELL, L. J.:—

In this case the facts and the conclusions I draw from them, so far as they need be stated, are as follow: The appellant Adamson and the bankrupts agreed to have a joint speculation in, among other things, cotton. The bankrupts were to buy and sell cotton on joint account. The cotton was to be paid for by the bankrupts, who were to draw on the appellant for the amount of the price. They could then procure the bills to be discounted, and, with the proceeds, pay the price of the cotton; or, of course, if their means had enabled them, they might have kept the bills and paid for the cotton out of their general funds. If, when the bills became due, the cotton was not sold, then the bankrupts were to draw fresh bills on the appellant, and, as before, or out of their general funds, provide for the former bills. The bankrupts represented to the appellant that they had bought quantities of cotton, and drew bills on him for the amount of the price. These bills he accepted. They were renewed from time to time, and ultimately the last renewals were paid by the appellant. It turned out that the statement that cotton had been bought was false and fraudulent, that scarcely any had been. Consequently, there was no cotton out of the proceeds of which the appellant could be reimbursed, and, the bankrupts having stopped payment before the last renewed bills became due, the appellant is now the amount of them out of pocket. Further, the fraud, on the evidence before us, must be taken to be a fraud by each of the bankrupts as much as by either. Under these circumstances the appellant had a claim on the bankrupts which he might have presented in any one of three shapes. He might have omitted all mention of fraud, and, relying on the contract of the bankrupts, might have complained that they had not bought cotton on joint account, and have sued them for unliquidated damages; or he might have put his claim as for a liquidated sum by showing the facts, with no statement of fraud, and saying that the law raised a duty in the bankrupts to pay the bills, the same as in the case of an accommodation bill, and that, therefore, his payment under the compulsion of being the acceptor was a payment by him for them. Had he put his case in either of these ways, he would have put it in a way which entitled him to prove against their joint estate, either for a specific ascertained debt or

for unliquidated damages, and not against either separate estate. Or he might have maintained a claim against them for a tort, for the fraud they had committed, in which case one may observe that, according to Barwick *v.* English Joint Stock Bank,[1] one partner would be liable for the fraud of the other, even if personally innocent of it. This claim he might have maintained against both jointly or either separately from the other for unliquidated damages, and, except that he is precluded by his proof, might do so now; for if he had shaped his case in this way, he would have shaped it in a way which showed that he had not a provable claim, and so the bankruptcy of those liable would be no impediment to his maintaining an action against them. These are the ways in which he might have shaped his claim at common law before the Judicature Act, and so he may now. But, beside these three ways of shaping and enforcing his claim, it appears there is another. It seems that a court of equity, before the Judicature Act, where a definite specific sum of money was obtained by fraud by two or more persons, would decree a restitution of the sum so obtained, and make the decree against the defendants joint and several. Why, I know not. If there was no fraud the plaintiff would be sent to law. So he would if the damages were unliquidated. But where there was the combination of two things neither of which was enough, the court of equity would grant relief. So, of course, must the High Court now. So that the appellant may now maintain an action for the fraud, and recover, as I have pointed out, in accordance with the former common-law practice, unliquidated damages against the defendants jointly, or, according to the former equity practice, a liquidated sum against them jointly and severally. But how does this entitle him to prove for the liquidated sum due and recoverable for a fraud, any more than he could for the unliquidated sum due and recoverable for a fraud? It is to be remembered that he has not got a judgment. If he had, the amount would be provable, whether recovered for a fraud, a slander, or any other tort. What is the difference between the two claims both founded on fraud? One is a claim for a liquidated, the other for an unliquidated sum. But that is an immaterial difference, as claims for unliquidated amounts are provable now. What other difference is there? The former equity decree for the liquidated sum would be against the defendants jointly and severally. The judgment at common law would be against them jointly only. But this makes no difference; the foundation of the claim is the same, and, as I have said, no judgment has been got. And though the common-law judgment is not against the defendants jointly and severally, its effect is nearly the same. If the claim for the unliquidated amount is not provable, why is that for the liquidated? The reason why the one is not provable is equally applicable to the other. And that reason is this, that the law does not allow it. Claims founded on tort are not provable; nothing is provable but those claims which arise out

[1] L. R. 2 Ex. 259.

of contract. The Bankruptcy Act, sect. 1, says, "Debt provable in bankruptcy shall include any debt or liability by this Act made provable in bankruptcy." Sect. 31 says, "Demands in the nature of unliquidated damages arising otherwise than by reason of a contract or promise shall not be provable in bankruptcy." If that was all, it might be said that this is not a demand in the nature of unliquidated damages, and therefore not prohibited. True, it may not be thereby prohibited, but the next clause is "save as aforesaid all debts and liabilities," etc., shall be deemed to be debts provable, and "liability" is afterwards said to include a variety of matters all of which suppose an express or implied contract. There are, no doubt, provable debts where there is no contract, as a debt on a judgment. But in such cases the law implies a duty to pay it. But, certainly, till the present case, it was never supposed that a claim for a wrong was provable, or that the discharge of the bankrupt released him from such a claim. Would the discharge of these bankrupts discharge them from an action against them in the form of the old suit in equity for a joint and several decree for payment of money? The proof against the separate estate in Read *v.* Bailey,[1] was the proof of a debt. The proof in Phosphate Sewage Company *v.* Hartmont[2] was ordered without the question being mooted as to whether the ground of fraud in the case prevented the proof. The proof against the separate estate of the infant obligor of a joint and several bond was allowed, because it was a joint and several bond, and he was held to be bound by it. Breaches of trust are provable against joint or separate estate, because, I suppose, trustees are held to undertake jointly and severally for the performance of their duties, not because there is fraud in breach of trust. There may be a breach of trust where in all good sense there is no pretence for saying there is fraud. To my mind, then, the present claim is contrary to principle, contrary to the statute, and without precedent. Mr. Justice LINDLEY'S opinion is clearly against it. On the other point, whether the appellant is too late to change his proof, I am in his favor. I will only add that I cannot see that the separate estate has any ground for complaint, except that the proof comes late, which is no objection; and that the joint estate cannot complain that it is relieved of a proof. But, on the other ground, I am of opinion that the appeal should be dismissed.

The Court gave the trustee leave to appeal to the House of Lords, on condition of his presenting the appeal within a month.

[1] 3 App. Cas. 94. [2] 5 Ch. D. 394.

PHILLIPS *v.* HOMFRAY.

IN THE COURT OF APPEAL, JULY 9, 1883.

[*Reported in Law Reports* 24 *Chancery Division*, 439.]

THIS suit was instituted in the year 1866 by the plaintiffs against S. Homfray and other persons, including the deceased R. Fothergill, praying for a declaration that the defendants were liable in respect of certain coal and ironstone gotten and removed by them from under the plaintiffs' farm, for an account of the coal and ironstone gotten by them from under the farm, for an account of coal and ironstone conveyed from the defendant's own mines through roads and passages under the plaintiff's farm, and that the defendants might be decreed to pay for the coal and ironstone wrongly gotten by them from under the plaintiffs' farm at their proper value, and also to pay a wayleave rent or compensation in respect of their user of the roads and passages under the plaintiffs' farm for the conveyance of their own coal and ironstone; also that they might pay compensation for the damage done to the surface of the plaintiffs' farm, and for other relief. The facts of the case are substantially set forth in Law Rep. 6 Ch. 770. On the 28th of August, 1869, W. H. Forman, one of the defendants, died, and the suit was revived against his executors. The cause came on for hearing before Vice-Chancellor STUART, together with the cross-suit of Fothergill *v.* Collins, in which the defendants in the first-named suit prayed against the plaintiffs in the first-named suit specific performance of an agreement for sale of the plaintiffs' farm. On the 9th of May, 1870, a decree was made in both suits by the Vice-Chancellor, which was appealed from. The appeal came on for hearing before Lord HATHERLEY, L. C., who on the 30th of June, 1871, made an order varying the decree of the Vice-Chancellor.

By the Vice-Chancellor's decree, as varied on appeal, it was, amongst other things, declared that the defendants Fothergill and S. Homfray in the first suit, and the estate of the deceased defendant W. H. Forman in the first suit, were answerable to the plaintiffs in the first suit for and in respect of all coal, ironstone, and other produce at any time gotten or removed by them, or by their order, or for their use, under the plaintiffs' farm, or any part thereof, and that the defendants S. Homfray and R. Fothergill were liable to make compensation to the plaintiffs in the first suit for user of all roads and passages under the said farm; and the following inquiries were directed: 1. An inquiry what quantities of coal, ironstone, and other produce have been so gotten or removed as aforesaid. And it was ordered that the market price or value, or as near thereto as may be, of all coal, ironstone, and other produce so gotten or removed as

aforesaid at the pit's mouth (all just allowances being made to the defendants in the first suit in respect of their charges and expenses, if any, on account of the carriage to the pit's mouth or otherwise of such coal, ironstone, and other produce, but no allowance being made for the expense of getting, severing, or working the same) be certified. And it was ordered that the following further inquiries be made: 2. An inquiry what quantities of coal, ironstone, and other produce have been conveyed from the collieries and mines of the defendants in the first suit in the pleadings mentioned, or any of them, over or through the roads or passages under the plaintiffs' said farm. 3. An inquiry what amount, upon the result of the inquiry last directed, ought to be paid by the defendants in the first suit to the plaintiffs in the first suit for wayleave and royalty in respect of the user by the defendants in the first suit of the said roads and passages for the purpose of working their said collieries and mines. 4. An inquiry whether the said farm and the mineral property of the plaintiffs in the first suit under the same have sustained any, and if any, what amount of damage by reason of the manner in which the defendants in the first suit have worked the coal, ironstone, and other produce under the plaintiffs' said farm.

R. Fothergill died on the 19th of September, 1881, and the suit of Philipps *v.* Homfray was revived against the defendant Mary Fothergill, as executrix of his will. In consequence of litigation with the lady of the manor in which the plaintiffs' farm is situate (see Llanover *v.* Homfray [1]) the above inquiries in Phillips *v.* Homfray were not proceeded with until July, 1882, when an order was made by Mr. Justice KAY in chambers directing that the inquiry should be made by the official referee, who, after hearing the parties for some days, adjourned the case until the first of July, 1883.

In February, 1883, a motion was made by Mrs. Fothergill before Mr. Justice PEARSON that all proceedings under the second, third, and fourth inquiries might be stayed, and the official referee directed not to proceed with them. The motion was argued on the 15th, 17th, and 20th of February, 1883.

February 24, Mr. Justice PEARSON made an order staying the fourth inquiry, but refused to stay the second and third inquiries.

Mrs. Fothergill appealed against this order as regarded inquiries two and three, and the plaintiffs gave cross-notice of appeal against it as regarded inquiry four. The appeals were argued on the 22d and 30th of May, 1883.

Rigby, Q. C., and *Osler*, for Fothergill's executrix: —

The trespasses which form the subject of inquiries two, three, and four are personal trespasses in tort, and give no right of action against the executors of the trespasser. The Court of Chancery could not give damages

[1] 19 Ch. D. 224.

in respect of wayleave. Powell *v.* Aiken.[1] It makes no difference that the trespasser made a profit by the trespass. Unless some part of the plaintiff's property can be traced into the trespasser's estate, or unless the damages were assessed before the trespasser's death, his estate cannot be made liable after his death. Peek *v.* Gurney.[2]

[Bowen, L. J. : — In many cases you may waive the tort and claim damages on the implied contract.]

For the use of real estate you cannot get damages for use and occupation if you treat the defendant as a trespasser. Birch *v.* Wright.[3] If there is nothing before the jury except that the plaintiff is owner and the defendant is in possession, they may presume that the defendant was in possession with the leave of the plaintiff, and may give damages for use and occupation. But if there is evidence that the defendant is a trespasser, a claim for use and occupation will not lie. You must be able to imply a contract. Churchward *v.* Ford ;[4] Tew *v.* Jones.[5] You cannot get mesne profits against the executor of a person who has been in unlawful possession, because it is a trespass. Mayne on Damages;[6] Adams on Ejectment ;[7] Pulteney *v.* Warren.[8]

In the present case Fothergill was treated as a trespasser from first to last, and the plaintiffs could not have recovered damages for use and occupation. Turner *v.* Cameron's Coalbrook Steam Coal Company ;[9] Kirk *v.* Todd.[10] The latter case goes too far in saying that the testator got no benefit, for he did get a benefit.

[Baggallay, L. J. : — Lord Mansfield says in Hambly *v.* Trott[11] that if a man takes the horse of another an action for the use and hire of the horse will lie against his executor on an implied assumpsit.]

If Lord Mansfield is right in saying that you can bring an action against executors in such a case, that does not apply to real estate. Bishop of Winchester *v.* Knight.[12]

[Baggallay, L. J. : — A decree was actually made against Fothergill in his lifetime.]

Yes ; but the damages had not been assessed. Therefore the proceedings against him were not complete. Wheatley *v.* Lane ;[13] Smith *v.* Eyles.[14]

Hastings, Q. C., and *Maclean*, for the plaintiffs : —

Whenever a wrongful act has been productive of benefit to the testator's estate, the injured person may follow the profit and recover against the estate. Hambly *v.* Trott. We claim to recover from the testator's estate the profit which he got by his wrongful act. The real question is whether the testator's estate has been increased. Monypenny *v.* Bristow.[15]

[1] 4 K. & J. 343.
[2] L. R. 6 H. L. 377.
[3] 1 T. R. 378.
[4] 2 H. & N. 446.
[5] 13 M. & W. 12.
[6] 3rd Ed. p. 391.
[7] 4th Ed. p. 336.
[8] 6 Ves. 73.
[9] 5 Ex. 932.
[10] 21 Ch. D. 484.
[11] 1 Cowp. 371.
[12] 1 P. Wms. 406.
[13] 1 Wms. Saund. 216a.
[14] 2 Atk. 385.
[15] 2 Russ. & M. 117.

[Bowen, L. J.: — The damages against Fothergill in his lifetime were twofold: first, in respect of the damage done to the plaintiffs; and secondly, in respect of the profit which Fothergill had made and which he ought to have paid over to the plaintiffs. When he died why do not the latter survive though the first do not?]

[Cotton, L. J.: — One difficulty is, that the plaintiffs did not waive the tort, but insisted on it, and elected to bring their action in that form. Then, how can they now go on against the executrix?]

The appellant refers to Pulteney *v.* Warren,[1] but that case destroys the defendant's position in equity. There was here a fraudulent concealment — had there not the plaintiffs might have got a decree ten years sooner. The plaintiffs could not with reasonable diligence have discovered the fraud earlier, so the Statute of Limitations is no defence. Ecclesiastical Commissioners *v.* North Eastern Railway Company.[2]

[Cotton L. J.: — Is there any case where it has been held that fraudulent concealment prevents the application of the rule *actio personalis moritur cum persona*?]

The precise point does not appear ever to have been raised. Even if the executors could not be sued at law there are here equitable circumstances which entitle the plaintiffs to sue for mesne rents and profits, according to the principles laid down by Lord Eldon in Pulteney *v.* Warren.[3] Now as to the cases referred to by the appellant. In Powell *v.* Aiken[4] the person against whom the relief was sought was not the person who had made the passages, and if the context is taken into account it is clear that the expressions of the Vice-Chancellor, on which the appellant relies, refer to consequential damages, not to profit derived by the wrongdoer from the trespass. In Bishop of Winchester *v.* Knight[5] it is only said that a trespass of breaking up meadow or ancient pasture ground dies with the person. That is a mere case of damage from which the trespasser does not derive profits. The case of mines, as observed by Lord Eldon in Pulteney *v.* Warren,[6] stands on quite a different footing. Then the appellant contends that the frame of the decree precludes the plaintiffs from raising this question, for that it is framed in tort, and Smith *v.* Eyles[7] is relied upon as supporting the proposition that though a decree is prefaced by a declaration that a party is bound to make compensation, still the decree cannot be prosecuted after the death of the party; but the case really decided nothing as to whether the decree could be prosecuted, it only decided that a decree to account did not prevent the executor from suffering a judgment which would have priority over the plaintiff's claim. It assumes, in fact, that the decree could be prosecuted. The decree in the present case really is not framed in tort, it gives compensation for use and occupation, and is

[1] 6 Ves. 73.
[2] 4 Ch. D. 845.
[3] 6 Ves. 73, 88, 93.
[4] 4 K. & J. 343.
[5] 2 Atk. 385.
[6] 6 Ves. 73.
[7] 1 P. Wms. 406.

substantially a decree for payment of the profits derived from the use of a wayleave. There is no analogy between a common-law inquiry as to damages and a case like this. In Monypenny *v.* Bristow[1] a suit was held maintainable against an executor for rents wrongfully received by his testator, on the express ground that where an injury is accompanied by a profit to the trespasser the party injured may waive the tort and bring an action for the profit. The decree was made in Fothergill's lifetime and fixes his liability. What remained to be done was only of a ministerial character and ought to be proceeded with. As to the fourth inquiry it sounds like a mere case of unliquidated damages, but it is so connected with inquiry one that it must go with it.

[COTTON, L. J.: — Inquiries one and four seem to me quite distinct.]

Rigby, in reply: —

The language of the Lord Chancellor in this case points only at damages for a continuing trespass. He gives damages, not measured by what the plaintiffs lose or the defendants get, but damages as to the *quantum* of which there is a discretion.

[COTTON, L. J.: — Is not the benefit derived by the trespasser the measure?]

Lord HATHERLEY would not have given that answer — he goes on what a person would usually have to pay for a wayleave. The words of Lord MANSFIELD in Hambly *v.* Trott[2] have always been treated as laying down the correct rule.

[BAGGALLAY, L. J.: — Do you say that if a trespasser gets a pecuniary benefit that benefit cannot be recovered?]

I do say so. If a person occupies my land and gets profit by allowing persons to pass over it, I cannot sue for the money he so receives, my only remedy is to sue for damages for the trespass.

[BOWEN, L. J.: — Would not an action for money had and received lie if an office the holder of which received fees was usurped?]

Yes; the fees are incident to the office, it is like a trespasser on land receiving rents from the tenants.

[BAGGALLAY, L. J.: — What do you say to Lord MANSFIELD's illustration in Hambly *v.* Trott as to the horse?]

It is the only part of Hambly *v.* Trott that is against me, and it is not supported by any other authority.

July 9. BOWEN, L. J., delivered the judgment of Lord Justice COTTON and himself. His Lordship, after stating the proceedings as above down to the application to Mr. Justice PEARSON, proceeded as follows: —

Mr. Justice PEARSON stayed the fourth inquiry on the ground that it had necessarily abated by reason of the death of R. Fothergill, but refused to stay the second and third inquiries.

The defendant Mary Fothergill has appealed against his refusal to stay

[1] 2 Russ. & M. 117. [2] 1 Cowp. 371, 376.

the second and third of these inquiries, while the plaintiffs, by their cross-appeal, complain of his decision that the fourth inquiry is to be stayed; and the question raised in both appeals is how far the respective inquiries, and the plaintiffs' claim in virtue of which they were directed, are affected by the principle *actio personalis moritur cum persona.*

The plaintiffs' claim out of which the second and third inquiries spring is a claim to be compensated for the secret and tortious use made by the deceased R. Fothergill and others during his lifetime of the underground ways and passages under the plaintiffs' farm for the purpose of conveying the coal and ironstone of R. Fothergill and his co-trespassers. The judgment of Mr. Justice PEARSON as to these two inquiries is based upon the view that this description of claim did not abate upon R. Fothergill's death, but was capable of being prosecuted against the assets in the hands of his executrix. That it is in form a claim in the nature of a claim for trespass, the damages for which were to be measured by the amount of wayleave which the defendants would have had to pay for permission to use the plaintiffs' ways and passages, cannot be disputed. But Mr. Justice PEARSON was of opinion that this was one of the class of cases in which a deceased man's estate remained liable for a profit derived by it out of his wrongful acts during his lifetime. The learned Judge founded his opinion upon certain language of Lord MANSFIELD in the case of Hambly *v.* Trott,[1] to the effect that, so far as the act of the offender had been beneficial to himself, his assets ought to be answerable. We have therefore to consider, in the first place, what is the true limit and meaning of the rule that a personal action dies upon a defendant's death, and whether there is, or can be, in the circumstances raised by the case, a profit received by his assets, which the plaintiffs can follow.

The only cases in which, apart from questions of breach of contract, express or implied, a remedy for a wrongful act can be pursued against the estate of a deceased person who has done the act, appear to us to be those in which property or the proceeds or value of property, belonging to another, have been appropriated by the deceased person and added to his own estate or moneys. In such cases, whatever the original form of action, it is in substance brought to recover property, or its proceeds or value, and by amendment could be made such in form as well as in substance. In such cases the action, though arising out of a wrongful act, does not die with the person. The property or the proceeds or value which, in the lifetime of the wrong-doer, could have been recovered from him, can be traced after his death to his assets, and recaptured by the rightful owner there. But it is not every wrongful act by which a wrong-doer indirectly benefits that falls under this head, if the benefit does not consist in the acquisition of property, or its proceeds or value. Where there is nothing among the assets of the deceased that in law or in equity belongs to the plaintiff, and

[1] 1 Cowp. 374.

the damages which have been done to him are unliquidated and uncertain, the executors of a wrong-doer cannot be sued merely because it was worth the wrong-doer's while to commit the act which is complained of, and an indirect benefit may have been reaped thereby. Two illustrations can be given of the above distinction with regard to the liability of executors. The produce, proceeds, or value of waste, equitable or legal, committed by a tenant for life, can be followed into the hands of his executors, and retaken from them. If he has wrongly cut timber, the timber or its proceeds or value can be followed. But no action for waste — permissive or voluntary — as such, lies against the executors of a tenant for life. By non-repairing a house, or by ploughing up ancient meadow, the tenant for life may have indirectly benefited himself or saved his own pocket. But neither law nor equity recognize in this indirect benefit which he may have received any ground for proceedings against his executors. A second illustration may be given of the distinction we have referred to. The rents, or the produce or profits, of land, which have wrongly been received by a person other than the rightful owner (as a rule, and subject to certain exceptions, that we need not now discuss), may be pursued by the rightful owner, and recovered from the wrong-doer, or if he is dead from his estate. But there is a sense in which the term "profits" is used, with reference to land, to represent the unliquidated damages recoverable in respect of a trespass, as when an action for mesne profits is maintained, to recover, not the rents or produce of land, or their natural equivalent, but compensation for the bare possession wrongfully taken and held of the land itself. An action for mesne profits in this narrower sense will not lie at common law and apart from statute against executors, and no account would be decreed in equity, except in a case where the profits were either property or the produce or profits or value of property actually received. This line of demarcation has drawn itself in conformity with the classifications of forms of action known to the English law. As long as the maxim *actio personalis moritur cum persona* is preserved by the law of this country, the line drawn is neither inconvenient nor unreasonable. If every wrongful act which was attended consequentially and indirectly with advantage to the wrong-doer or his pocket were to warrant an action against executors, it would be impossible to know when executors were liable or not, and the maxim would, in fact, become a mere source of litigation. We have not now to consider the policy of the maxim. It is part of the law, and while it is so, ought not to be frittered away.

The judgment, however, of Mr. Justice PEARSON is based upon certain *dicta* of Lord MANSFIELD in Hambly *v.* Trott,[1] which are in form ambiguous, and it is necessary accordingly to examine these *dicta* with reference to the history of the maxim *actio personalis moritur cum persona*. Whatever its wisdom or policy, the rule with certain limitations and explanations is as

[1] 1 Cowp. 374.

old as the English law. By the civil law, penal actions arising from wrong were not generally available against the heir, and certain actions *ex contractu* fell under the same disability. By the English law an executor represents the debts and property, but not the person of the testator. It seems to have been thought that there would be an injustice in making the executor stand in the place of the dead man when the causes of action were purely personal (see Year Book.)[1] "The taking up of an executorship," says Bacon in his Abridgment, Executors,[2] "is an engagement to answer all debts of the deceased and all undertakings that create a debt, as far as there are assets, but doth not embark the executor in the personal trusts of the deceased, nor is he obliged to answer for his several injuries, for none can tell how they might have been discharged or answered by the testator himself." And even in some actions of contract, such as debt, where the testator could have waged his law, the executor was not held liable, for this would have been to deprive his executor of the benefit of the wager of law. As regards all actions essentially based on tort, the principle was inflexibly applied. There was, however, a species of personal actions to which the rule in question was not extended. These were such as were founded upon some obligation, contract, debt, covenant, or other duty to be performed: see Pinchon's Case;[3] Wheatley *v.* Lane.[4] If an injury has been done to the personal property of the plaintiff, for relief arising out of which assumpsit could be brought (as in the case of actions against carriers and bailees), the executors of the deceased might still be sued. It was urged before us on behalf of the plaintiffs that they were entitled in the present case to waive the tort which had been committed against them by the deceased, and to treat the claim as substantially one of implied contract or account, upon the theory of an implied promise by him to pay for what he had done, or at all events on the principle that his estate had reaped some measurable benefit or profit from the wrong, which the executrix was not entitled as against the plaintiffs to retain. Reference was made to the analogy of the cases where an action for money had and received has been held to be maintainable for the proceeds of goods wrongfully sold, and to a more doubtful class of authorities, in which it has been suggested that use and occupation would lie for the enjoyment of lands occupied, even in the absence of any demise by the plaintiff. It seems to us, as we have said, that the profits arising from a wrong done by a deceased man which can be followed against his estate are only such profits as take the shape of property or the proceeds or value of property withdrawn from the rightful owner and acquired by the wrong-doer. But in order to understand Lord MANSFIELD and the argument to which reference has been made, it is desirable to begin with some cases in the reign of Elizabeth which illustrate the matter.

[1] 19 H. 6, 66 B.
[2] 7th Ed. vol. iii. p. 537.
[3] 9 Rep. 86 b.
[4] 1 Wms. Saund. 216 a.

The first is that of Sir Henry Sherrington (cited in Savile[1] and referred to by Lord Mansfield in Hambly *v.* Trott).[2] Sir Henry Sherrington had cut during his lifetime and converted to his own use certain oaks and growing trees upon land belonging to the Queen. After his death the Attorney-General exhibited an information against his executrix, and Chief Justice Manwood in giving judgment has used language which it seems to us has been misunderstood: "In every case," he says, "in which a price or value has been set upon a thing in which the offence is committed, if the offender dies his executors shall be chargeable. As in this case the information is for cutting 100 oaks to the value of £100, or for taking 20 cattle of the Queen, price £20, the executors are chargeable, but where the action or information is for trampling the herbage, etc., *ad damnum*, the executor shall not be chargeable." The point of this judgment seems to us to be that the deceased had converted the Queen's property to his own use during his lifetime, and the Attorney-General was held entitled to recover for the Queen the property, or in default the value which represented the property or its proceeds. In Sir Brian Tucke's Case in the same reign,[3] it was held by the Barons of the Exchequer that the executor of an executor should not be charged with a *devastavit* made by the executor of the first testator, "No, not in the case of the King, because it is a personal wrong only." The collocation of these two cases points to the distinction which we have drawn. The proceeds or value of actual property acquired wrongfully by the testator can be recovered against an executor, but the mere fact that the wrongful act or neglect saved the testator from expense is not sufficient justification for suing his executor.

In Tooley *v.* Windham[4] the plaintiff brought an action against the defendant under the following circumstances. The defendant's father in his lifetime had taken the profits of certain lands, whereupon the plaintiff had purchased a writ out of Chancery against the defendant with the intention of exhibiting a bill against him. Upon the return of the writ for the said profits the defendant, in consideration that the plaintiff would forbear his suit, promised the plaintiff that if he would prove that his father had taken the profits or had had the possession of the lands under the title of the plaintiff's father, he the defendant would pay the plaintiff for the profits of the land. The court held that this was no consideration for the promise, on the ground that the taking of the profits of the plaintiff's lands by the defendant's father was a personal tort for which neither the executor nor heir could be made to answer. So far as we are aware, an action for mesne profits (or bare damages for wrongful possession or occupation of land) has never been considered maintainable at common law against the executors of the person who was wrongfully in possession.

[1] Page 40.
[2] 1 Cowp. 371.
[3] 3 Leon. 241.
[4] Cro. Eliz. 206.

But the language of Lord MANSFIELD in the case of Hambly *v.* Trott[1] is relied upon in the judgment of Mr. Justice PEARSON as going beyond the above line, and it is important, therefore, to examine it in detail. That action was an action of trover brought against an administrator with the will annexed for a conversion by the testator in his lifetime. The plea was that the testator was not guilty. A verdict having been found for the plaintiff, the court unanimously arrested the judgment on the ground that the cause of action as laid was a personal tort which died with the person. This was in accordance with the decision in Baily's Case.[2] The judgment in Hambly *v.* Trott can therefore be no authority for the appellants' contention; but the language of Lord MANSFIELD, which has since been cited with approval by the highest tribunals, is of course entitled to the utmost weight. Lord MANSFIELD in the first place observes that no action of tort where the plea must be not guilty will lie against an executor. "On the face of such a record the cause of action arises *ex delicto*, and all private criminal injuries or wrongs, as well as all public crimes, are buried with the offender." This is the inflexible rule. In mitigation of the apparent hardship Lord MANSFIELD proceeds, *obiter dicta*, to point out that in most cases where trover lies against the testator another action might be brought against the executor which will serve the purpose, and he gives the following illustration. An action on the custom of the realm against a common carrier is for a tort and a supposed crime. The plea is not guilty, therefore such action will not lie against an executor. But assumpsit, which is another action for the same cause, will lie instead. "So," continues Lord MANSFIELD, "if a man takes a horse from another, and bring him back again, an action of trespass will not lie against his executor, though it would against him; but an action for the use and hire of the horse will lie against the executor." And in further illustration of this distinction Lord MANSFIELD points out that in Baily's Case the executor would have been liable for the value of the goods wrongfully sold by the testator, just as Sir Henry Sherrington's estate[3] was liable for the value of the trees he had cut and carried away. It is with reference to the above distinction that Lord MANSFIELD goes on to use the language which we think has been misunderstood. "Here, therefore, is a fundamental distinction. If it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer, as beating or imprisoning a man, etc., there the person injured has only a reparation for the *delictum* in damages to be assessed by a jury. But where, besides the crime, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. As, for instance, the executor shall not be chargeable for the injury done by his testator in cutting down another man's trees, but for the benefit arising to his testator for the value or sale of the trees he shall. So far as the tort itself goes an executor shall not be liable, and

[1] 1 Cowp. 375. [2] Sir T. Raym. 71. [3] Savile, 40.

therefore it is that all public and all private crimes die with the offender, and the executor is not chargeable; but so far as the act of the offender is beneficial his assets ought to be answerable, and his executor therefore shall be charged." It seems to us that Lord MANSFIELD does no more than indicate that there is a class of cases in which assumpsit can be brought against a wrong-doer to recover the property he has taken or its proceeds or value, and that in such cases the action will survive against the executor. In the illustration given by him of the horse, he does not mean that an action for the use and hire of a horse wrongfully taken will always lie against an executor, but that it will lie whenever a similar action would have lain against the wrong-doer himself. The case he puts is the case of a horse taken and restored, not of a horse taken and held under an adverse claim, and we are not prepared to say that, if absolutely nothing appeared in evidence except that a horse was taken and was afterwards brought back again, the owner might not recover for the use and hire of the horse on the hypothesis of an implied contract to pay for him. It is in such a sense that Lord ELLENBOROUGH, in Foster *v.* Stewart,[1] clearly understood Lord MANSFIELD'S language. We see nothing in the language of Lord CHELMSFORD in the House of Lords in Peek *v.* Gurney[2] to indicate that he understood it otherwise. If so, the true test to be applied in the present case is whether the plaintiffs' claim against the deceased R. Fothergill, in respect of which the second and third inquiries were directed in his lifetime, belongs to the category of actions *ex delicto*, or whether any form of action against the executors of the deceased, or the deceased man in his lifetime, can be based upon any implied contract or duty. In other words, could the plaintiffs have sued the deceased at law in any form of action in which "Not guilty" would not be the proper plea? If such alternative form of action could be conceived it must be either an action for the use, by the plaintiff's permission, of the plaintiff's roads and passages, similar in principle, though not identical, with an action for the use and occupation of the plaintiffs' land. Or it must be in the shape of an action for money had and received, based upon the supposition that funds are in the hands of the executors which properly belong in law or in equity to the plaintiffs. We do not believe that the principle of waiving a tort and suing in contract can be carried further than this, — that a plaintiff is entitled, if he chooses it, to abstain from treating as a wrong the acts of the defendant in cases where, independently of the question of wrong, the plaintiff could make a case for relief. There have been, no doubt, instances in which, nothing further appearing in evidence but that one person is the owner of land and that another had taken possession of and enjoyed it, an action for use and occupation under the statute has been upheld: see Hellier *v.* Silleox.[3] In such cases the inference, in the absence of proof to the contrary, has been allowed to be drawn, that the enjoyment was by permission of the

[1] 3 M. & S. 191. [2] L. R. 6 H. L. 393. [3] 19 L. J. (Q. B.) 295.

rightful owner. On a somewhat similar principle an action by the lord of a market for stallage was held maintainable against a person who fixed a stall in the soil without leave or license. The authority of this latter case has been questioned (see Turner *v.* Cameron's Coalbrook Steam Coal Company) ;[1] and actions for use and occupation, according to the better opinion, have been confined to the class of cases where defendant is not a trespasser setting up an adverse title, and where there are no circumstances that negative the implication of a contract: see Churchward *v.* Ford,[2] *per* POLLOCK, C. B.; Birch *v.* Wright.[3] No doubt the mere enjoyment by one man of another man's property, real or personal, may be had under such circumstances as leave still open, as a reasonable inference, the presumption that it is taken on the terms of payment, just as a man who takes a bun from the refreshment counter at a railway station, takes it on the implied promise to pay for it. So actions of assumpsit have been held to lie for the rents of land improperly received under pretence of title: see Bacon's Abridgement, Assumpsit;[4] Clarence *v.* Marshall, *per* BAYLEY, B.[5]

One of the most remarkable instances of waiver of a tort is to be found in the case of Lightly *v.* Clouston,[6] where the master of an apprentice who had been seduced from his service to work for another person was held justified in waiving the tort and bringing an action of *indebitatus assumpsit* for work and labor done against the tortfeasor. Lord MANSFIELD, in deciding the case, referred to the cases of the wrongful sale of goods, where, if the rightful owner chooses to sue for the produce of the sale, he may do it, the practice being an advantage and not a disadvantage to the defendant. The case was decided upon the ground that the labor of the apprentice belonged to his master, who might insist on an equivalent for it, or at all events, that the apprentice could not contract for the benefit of anybody except his rightful owner: see *per* Lord ELLENBOROUGH in Foster *v.* Stewart.[7] And actions in which the owners of goods wrongfully sold were held entitled to waive the tort, and to recover in assumpsit for the proceeds, had become familiar to the common law as far back as towards the end of the 17th century: see Lamine *v.* Dorrell.[8]

The difficulties of extending the above principle to the present case appear to us insuperable. The deceased, R. Fothergill, by carrying his coal and ironstone in secret over the plaintiffs' roads took nothing from the plaintiffs. The circumstances under which he used the road appear to us to negative the idea that he meant to pay for it. Nor have the assets of the deceased defendant been necessarily swollen by what he has done. He saved *his estate expense, but he did not bring into it any additional property or value belonging to another person.* The case of Kirk *v.* Todd[9] seems to us materially in point. There the owners of certain dye-works

[1] 5 Ex. 932.
[2] 2 H. & N. 446.
[3] 1 T. R. 378.
[4] 7th Ed. vol. i. p. 336.
[5] 2 C. & M. 495.
[6] 1 Taunt. 112.
[7] 3 M. & S. 191.
[8] 2 Ld. Raym. 1216.
[9] 21 Ch. D. 484, 488.

sued the original defendants for fouling and polluting a brook. It was held that the action would not survive against their executors. The late MASTER OF THE ROLLS used the following language: "This was an action on a simple tort. It did not appear that the defendant had got any benefit by fouling the plaintiff's stream, he had only injured the plaintiff. As I understand the rule at common law, it was this, — you could not sue executors for a wrong committed by their testator for which you could recover only unliquidated damages. That rule has never been altered except by the Act 3 & 4 Will. 4, c. 42, which allowed the executors to be sued in certain cases, but with the limitation that the injury must have been committed not more than six months before the death of the testator. That was not so here; therefore the statute did not apply, and the rule of the common law remained in its simplicity." In every case where one man fouls the flow of water to which another is entitled he probably saves himself expense by doing so. But the benefit to which the Master of the Rolls alludes appears to us to be some beneficial property or value capable of being measured, followed, and recovered.

It remains to be considered whether there is any equitable doctrine which can extend or vary the above rules of the common law. We can see none. An action for account will only, under such circumstances, lie where the defendant has something in his hands representing the plaintiffs' property or the proceeds or value of it. But if there were any such it could be recovered at law as well as in equity. It is true that the wrongful acts complained of were done in secret, but even if such concealment could raise in favor of the plaintiffs an equity to be relieved from the application of the principle *actio personalis moritur cum persona*, which we doubt, the fraud in this case was discovered during the lifetime of the deceased, R. Fothergill. The mere circumstance of the defendant's death, after the decree and before the accounts taken, would not raise any equity in the plaintiffs' favor, and as far as we can see the equity authorities relied upon in argument by the plaintiffs do not assist them. In Bishop of Winchester *v.* Knight [1] it was held that the lord of the manor might maintain a bill for an account of ore dug or timber cut by the defendant's testator. Lord Chancellor COWPER in giving judgment said, "It would be a reproach to equity to say, that where a man has taken my property, as my ore, or timber, and disposed of it in his lifetime, and dies, that in this case I must be without remedy." But he added, that the trespass of breaking up meadow or ancient pasture-ground dies with the person. If the plaintiffs in the present action were to recover, it is difficult to see why a landlord should not be entitled in equity to an account against the executors of his tenant, for a profit indirectly derived or expense saved by the testator through breaking up ancient meadow or pasture land. In Pulteney *v.* Warren [2] an account of mesne profits was decreed against executors on the special

[1] 1 P. Wms. 406, 407.

[2] 6 Ves. 73.

ground that the plaintiff had been prevented by injunction afterwards dissolved from proceeding in ejectment against the testator in his lifetime, and that it ought to have been one of the terms on which the injunction was granted that the testator or his estate would compensate the plaintiff against the loss of such mesne profits if the injunction turned out to be unjust. It would follow that, had not such special grounds existed, the bill for an account of mesne profits would have been held not maintainable against the executors. Pulteney *v.* Warren is therefore an authority which bears against the plaintiffs in the present case. In Monypenny *v.* Bristow [1] a suit was held maintainable against the executors for rents received during the continuance in possession of the testatrix, but the rents in question seem to have been rents which had actually been paid over to the testatrix and fell within the description of property taken by the trespasser.

The history of the case of Marquis of Lansdowne *v.* Marchioness Dowager of Lansdowne [2] appears to us to show that the doctrine of the courts of equity is in exact conformity with the distinction we have pointed out. A bill was filed by a remainderman against the representative of a deceased tenant for life without impeachment for waste. Two causes of complaint were put forward by the bill. The first that the deceased tenant for life had been guilty of equitable waste by cutting down ornamental timber and young trees about the property. A second cause of complaint was dilapidations which he had permitted in and about the mansion-house. The defendants demurred to so much of the bill as related to the former grievance, and the demurrer was decided in favor of the plaintiff on the ground that the plaintiff was entitled to the proceeds of the equitable waste, and to relief against the assets of the tenant for life so far as they were augmented by such proceeds, and an account was directed as to the equitable waste. The second cause of complaint, which related to the dilapidations, was dealt with on the hearing.[3] The Master of the Rolls decided that no account of the dilapidations could be decreed, observing that "with respect to incumbents the law was otherwise, and accordingly suits against their representatives were very common, but no instance of such suits by remaindermen had occurred." It has always been held that ecclesiastical dilapidations by deceased incumbents do not fall within the rule *actio personalis moritur cum persona*. The fact that an account was granted in respect of the produce of the timber wrongly cut, but refused in respect of the dilapidations, shows that the profit which equity follows into the hands of the executors must be some profit of which the plaintiff has been deprived, and not merely a negative benefit which the testator may indirectly have acquired by saving himself the expense of performing his duty.

In Gardiner *v.* Fell [4] no doubt was suggested as to the right of the court to decree an account of rents and profits against the personal representa-

[1] 2 Russ. & My. 117.
[2] 1 Madd. 116.
[3] 1 Jac. & W. 522.
[4] 1 Jac. & W. 22.

tives of a person who had taken possession under a mistake of law. It appears, however, to be probable, on the facts of the case, that the rents and profits in question were rents and profits actually received in the shape of moneys or actual property by the deceased, as distinguished from the mere wrongful use and occupation of land or houses.

It was pressed upon us by the counsel for the plaintiffs that, the decree having been made and the inquiries directed during the lifetime of the deceased R. Fothergill, his liability must be taken to have been pronounced, and that what remained to be done in the action was of a ministerial character only, and would not be affected by the maxim *actio personalis moritur cum persona*. We cannot take this view. The claim of the plaintiffs is in substance, so far as these inquiries are concerned, an action for trespass. The inquiries, whatever the form of language in which they are directed, are an assessment of damages, and until they have been completed the action is still undetermined. It is of the essence of the rule that claims which are indeterminate in their character shall not be pursued against the estate of a person after his death. If the claim is one for unliquidated damages, and has not been perfected by judgment at the time of the death of the defendant, the rule applies: Smith *v.* Eyles.[1] It appears to us accordingly that the claims of the plaintiffs to which the second and third inquiries are directed are claims for unliquidated damages in respect of a wrong done, and that the object of the inquiries is to assess such unliquidated damages. Such claims, and the inquiries which relate to them, abated in our opinion upon the death of the deceased, R. Fothergill. The appeal of the defendant, Mary Fothergill, as to the second and third inquiries will, therefore, be allowed, with costs. *A fortiori*, the claim in respect of which the fourth inquiry was directed, is a pure claim for damages for a wrongful act. It follows that, in our opinion, such claim and the inquiry under it abated by the death of R. Fothergill. The plaintiffs' cross-appeal must be dismissed accordingly, with costs. The order which Mr. Justice Pearson made as to the fourth inquiry will thus be extended to the second and third inquiries.

Baggallay, L. J.: — I regret that, as regards the appeal of Mrs. Fothergill, I have arrived at a conclusion different from that which has been arrived at by the other members of the court. I am of opinion that the appeal should be dismissed, for the reasons which I am about to state. Though the case of Hambly *v.* Trott[2] has been very fully considered by Mr. Justice Pearson in the course of his judgment, and also by my colleagues in that which has been just delivered, I desire to add my own comments upon it, as its true effect has, in my opinion, been to some extent misapprehended.

The judgment in Hambly *v.* Trott[2] is generally referred to as that of Lord Mansfield, but it expressed the unanimous, fully considered opinion

[1] 2 Atk. 385. [2] 1 Cowp. 371.

of the court, which included Justices Acton and Ashurst, as well as Lord Mansfield, and was delivered after the case had been twice argued. The action was in trover against an administrator with will annexed; the declaration laid an unlawful conversion by the testator to his own use of certain sheep, pigs, goats, oats, and cider; the plea was that the testator was not guilty; the verdict being for the plaintiff, the court was moved on behalf of the defendant in arrest of judgment upon the ground that the wrongful act of the testator was a personal tort which died with the person; a rule to show cause was granted, and it was upon cause being shown that the judgment was given. At the close of the arguments on the first occasion Lord Mansfield said, "I shall be very sorry to decide that trover will not lie if there is no other remedy for the right," and after an opinion expressed by the other judges that as then advised they thought the action maintainable, the court ordered the matter to stand over for further argument, Lord Mansfield adding, "The criterion I go upon is this, can justice possibly be done in any other form of action?" After the second argument on the 24th of January, 1776, the court took time to consider its judgment, and on the 12th of February in the same year held that the judgment must be arrested. But it is important to notice the grounds upon which the court arrived at this conclusion. After stating (*a*) that the maxim "*actio personalis moritur cum persona* was not generally true and much less universally so, and that it left the law undefined as to the kind of personal actions which die with the person or survive against the executor, and (*b*), that an action of trover was in form a fiction, and in substance founded on property, for the equitable purpose of recovering the value of the plaintiffs' specific property used and enjoyed by the defendant, and that if no other action could be brought against the executor it seemed unjust and inconvenient that the testator's assets should not be liable for the value of what belonged to another man which the testator had reaped the benefit of; and (*c*), that the court, deeming the matter well deserved consideration, had carefully examined all the cases upon the subject, Lord Mansfield proceeded to enunciate the conclusions at which the court had arrived as to actions which survived against an executor, and those which died with the person, distinguishing between those which survived or died on account of the cause of action, and those which survived or died on account of the form of action, a distinction which it is in my opinion most important to bear in mind.

As regards those actions which survive or die on account of the cause of action, Lord Mansfield expressed himself as follows:[1] "Where the cause of action is money due, or a contract to be performed, gain or acquisition of the testator by the work and labor or property of another, the action survives against the executor. But where the cause of action is a tort, or arises *ex delicto*, supposed to be by force and against the King's

[1] 1 Cowp. 375.

peace, there the action dies: as battery, false imprisonment, trespass, words, nuisance, obstructing lights, diverting a water-course, escape against the sheriff, and many others of the like kind," and as regards those actions which survive or die in respect of the form of action, he went on to say as follows: "In some actions the defendant could have waged his law, and therefore no action in that form lies against an executor. But now other actions are substituted in their room upon the very same cause which do survive and lie against the executor. No action where in form the declaration must be *quare vi et armis et contra pacem*, or where the plea must be, as in this case, that the testator was not guilty, can lie against the executor. Upon the face of the record the cause of action arises *ex delicto*, and all private criminal injuries or wrongs, as well as all public crimes, are buried with the offender." But having said thus much Lord MANSFIELD added, that in most, if not in all, of the cases where trover lies against the testator another action might be brought against the executor which would answer the purpose. In applying the rules so enunciated to the circumstances of the case then under consideration, the court held that the form of the plea that the testator was not guilty was decisive, and that the judgment must be arrested, but added that no mischief would be thereby occasioned, because, so far as the cause of action did not arise *ex delicto* or *ex maleficio* of the testator, but was founded on a duty which the testator owed to the plaintiff, another form of action might be brought. It would appear then that the judges who disposed of Hambly *v.* Trott[1] were of opinion, first, that the cause of action was such that the executors might have been made liable; secondly, that by reason of the form of the action, the declaration being in trover, and the plea that the testator was not guilty, it could not be maintained against the executors; and thirdly, and notwithstanding the arrest of judgment in the pending action, another form of action might be brought and maintained against the executors. It is to my mind clear that the judges were of opinion that the merits were with the plaintiff, but that they were precluded by the technicalities of the pleadings from giving him that to which they deemed him morally entitled. That this was their view is supported by the comments of Lord MANSFIELD upon two older cases, which he cited in the course of the judgment. In the first of those cases, which was later in date than the other, and which he cited from Sir Thomas Raymond, the plaintiff declared that he was possessed of a cow which he delivered to the testator to keep for the use of the plaintiff, which cow the testator sold, and disposed of the money to his own use, and that neither the testator nor the defendant, his executor, had ever paid the money. Commenting upon this case Lord MANSFIELD said:[2] "Upon this state of the case no one can doubt but that the executor was liable for the value. But the special injury charged obliged him to plead that the testator was not guilty." That is to say, the cause of action was such as to

[1] 1 Cowp. 371. [2] 1 Cowp. 376.

render the executor liable, but a form of action was adopted which obliged the defendant to plead that the testator was not guilty. The jury found the defendant guilty, but on motion for arrest of judgment it was held that the executor ought not to be chargeable. The other case cited was that known as Sir Henry Sherrington's.[1] He had cut down trees upon the land of Queen Elizabeth, and converted them to his own use. Upon an information against his widow, Justice MANWOOD, in the course of his judgment, said: "In every case where any price or value is set upon the thing in which the offence is committed, if the defendant dies his executor shall be chargeable, but where the action is for damages only, in satisfaction of the injury alone, there his executors shall not be liable." In further commenting upon these two cases Lord MANSFIELD said:[2] "Here therefore is a fundamental distinction. If it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer, as beating or imprisoning a man, etc., there the person injured has only a reparation for the *delictum* in damages to be assessed by a jury. But where besides the crime property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. As for instance, the executor shall not be chargeable for the injury done by his testator in cutting down another man's trees, but for the benefit arising to his testator from the value or sale of the trees he shall."

Upwards of one hundred years have elapsed since this judgment in Hambly *v.* Trott[3] was delivered. It has ever since been regarded as an accurate representation of the state of the law as affecting executors in respect of causes of action and forms of action arising out of the acts of their testators. The circumstances under which the wrongful act with which we at present have to deal was committed may be concisely stated as follows: In the year 1866 the plaintiffs were the owners of a farm in Monmouthshire, and the defendants, Homfray, Fothergill, and Forman, who carried on business under the style of the Tredegar Iron Company, had for some time past been working the minerals underlying lands adjoining the plaintiffs' farm, and in the course of that year the plaintiffs discovered that the defendants were not only getting minerals from under the farm but were using roads and passages made by them through the plaintiffs' minerals for the conveyance of minerals gotten by the defendants from their own mines. In the observations I am about to make it is important to bear in mind the nature of the wrongful act in respect of which the plaintiffs claim redress; but I deem it unnecessary to further refer to the institution and progress of the suit, as those have been sufficiently detailed in the judgment which has just been delivered. It has hardly been disputed on the present appeal that a remedy for a wrongful act can be pursued against the estate of a deceased person by whom the act has been committed, when property, or the proceeds of property, belonging to another have been ap-

[1] Savile, 40. [2] 1 Cowp. 376. [3] 1 Cowp. 371.

propriated by the deceased person, in other words, that the action in such cases, though arising out of a wrongful act, does not die with the person; but it has been urged that the principle thus enunciated is limited to cases in which property, or the proceeds of property, have been appropriated by the deceased person, and that it does not apply to a case in which the deceased person has derived any other benefit from his wrong-doing than property or the proceeds of property, and in particular that it does not apply to a case in which the benefit derived has not been in the form of an actual acquisition of property, but of a saving of expenditure which must otherwise have been incurred by the wrong-doer, as in the present case, in which, for the purpose of the present argument, it must be assumed that by the use by the defendants, for the carriage of their minerals, of the roads and passages under the plaintiffs' farm, there was a saving to them of an expenditure which they must otherwise have incurred.

Speaking with much diffidence, as my views in this respect differ from those of my colleagues, I feel bound to say that I cannot appreciate the reasons upon which it is insisted that although executors are bound to account for any accretions to the property of their testator derived directly from his wrongful act, they are not liable for the amount or value of any other benefit which may be derived by his estate from or by reason of such wrongful act. I can find nothing in the language used by Lord MANSFIELD that can support this view. On the contrary, when classifying the actions which survive against an executor by reason of the causes of action, he includes among such causes of action "gain or acquisition by the testator by the work and labor or property of another," and he in no respect limits or qualifies the nature or character of the "gain" referred to. A gain or acquisition to the wrong-doer by the work and labor of another does not necessarily, if it does at all, imply a diminution of the property of such other person. Whether the amount of the wayleave which a person could reasonably be called upon to pay for the use for the carriage of his minerals over the roads of another, would be a fair measure of the gain or acquisition to the property of the person who has so used them without paying any wayleave, is a question which it is not necessary to decide. I entertain no doubt as to there being ample means of ascertaining the amount of gain or acquisition to the property of a person so using the roads of another. That Lord MANSFIELD did not intend to limit the generality of the rule enunciated by him in the manner suggested is, I think, clear from the following observations made by him in the course of the first argument in Hambly *v.* Trott:[1] "Suppose the testator had sold the sheep, etc., in question. In that case an action for money had and received would lie. Suppose the testator had left them in specie to the executors, the conversion must have been laid against the executors. Suppose the testator had consumed them and had eaten the sheep, what action would have lain there?

[1] 1 Cowp. 373.

Is the executor to get off altogether? I shall be very sorry to decide that trover will not lie if there is no other remedy for the right." It appears to me clear that in the opinion of Lord MANSFIELD the injured owner of the sheep was equally entitled to redress against the estate of the wrong-doer, whether the sheep were sold by him, or were consumed by him, or were left by him in specie at his death. Now, if the sheep had been consumed by the testator, the only accretion to his property derived from his so doing would have been the amount of the saving in his butcher's bill, and I am unable to appreciate the distinction in principle between adding to his property by savings in the amount of his butcher's bills and by savings in the cost of carrying his minerals. Upon the whole, I have come to the conclusion that the causes of action which were the foundation of the decree made in the present suit, and to which I deem it unnecessary to more particularly refer, were such as, within the rule in Hambly *v.* Trott,[1] to entitle the plaintiffs to maintain their suit against Mrs. Fothergill as the executrix of the deceased defendant, R. Fothergill, in respect of the subject-matter of the second and third inquiries directed by the decree. Whether the proceedings which the plaintiffs have adopted for the purpose of enforcing their rights are in form such as to entitle Mrs. Fothergill to succeed in her appeal is a question the consideration of which I will postpone until after I have referred to some cases in equity which appear to me to have an important bearing upon it, but as to some of which the views formed by me in some respects differ from those expressed in the judgment of my colleagues.

The first case to which I will refer is that of Garth *v.* Cotton,[2] decided by Lord Hardwicke in the year 1753. This was before the decision in Hambly *v.* Trott. The bill was for an account of all sums of money produced by a fall of timber in the year 1714. A number of objections were raised on the part of the defendant, the seventh of which was stated by Lord HARDWICKE[4] in the following terms: "I shall mention but one objection more, and that arises recently from the present state of the cause, as it comes before the court upon a bill of revivor against the representative of Sir John Hind Cotton, the original defendant, — that an action of waste dies with the person, and if the plaintiff had in other respects been in a condition to maintain waste against Sir John Hind Cotton, the party to the articles, it had been gone by his death; that the law is the same as to the action of trover: *pari ratione* he hath lost his equitable remedy for the waste." In meeting this objection Lord HARDWICKE[5] said: "There have been several determinations in this court where, by force of the rule *actio personalis moritur cum persona*, the remedy at law hath been extinguished, yet equity hath given the like satisfaction;" and after referring to various authorities, he proceeded as follows;[6] "I hold that in all cases of fraud the

[1] 1 Cowp. 371. [2] 1 Dick. 183. [3] 1 Cowp. 371.
[4] 1 Dick. 214. [5] 1 Dick. 215. [6] 1 Dick. 217.

remedy doth not die with the person; but the same relief shall be had against an executor out of the assets of his testator as ought to have been given against the testator himself. For, as equity disclaims the maxim that a personal remedy dies with the person, wherever the demand is proper for that jurisdiction, this court will follow the estate of the party liable to that demand, and out of that decree satisfaction."

In 1801 the case of Pulteney *v.* Warren[1] came before Lord ELDON. The bill prayed an account of mesne profits against the executors of one Dr. Warren. Under ordinary circumstances a bill in equity could not be maintained for an account of mesne profits, the proper jurisdiction being at law; and the substantial question was whether under the special circumstances of the case the suit could be maintained. The plaintiff had been prevented from recovering in ejectment by a rule of the Court of King's Bench staying proceedings against Dr. Warren, to abide the result of proceedings in the House of Lords in another case, and also by an injunction at the instance of the occupier, who ultimately failed both at law and in equity. Lord ELDON held that these circumstances were sufficient to justify the plaintiff in commencing proceedings in equity, and having upheld the jurisdiction, he decreed the account prayed against Dr. Warren's executors, though it was strongly urged upon him that, having regard to the case of Hambly *v.* Trott,[2] the remedy was gone by reason of the death of Dr. Warren. It being held that the demand of the plaintiff was one which could properly be entertained in equity, the common-law maxim that the personal remedy died with the person was disregarded.

The case of Marquis of Lansdowne *v.* Marchioness Dowager of Lansdowne[3] came before the Vice-Chancellor, Sir THOMAS PLUMER, in 1815. The bill was against the representative of a deceased tenant for life, and prayed an account of equitable waste committed by him; on the part of the defendant it was urged that if the tenant for life had committed waste and died, his representatives would not have been answerable, and that the same doctrine applied by analogy to equitable waste. In dealing with this argument Sir THOMAS PLUMER quoted in some detail the observations of Lord MANSFIELD in Hambly *v.* Trott, and added:[4] "This I take to be a just exposition of the qualifications under which the maxim *actio personalis moritur cum persona* is received at law; and, if equity is to decide in analogy to a court of law, the question in the present case will be whether, by the equitable waste committed by the late Marquis, he derived any benefit, or whether it was a naked injury by which his estate was not benefited? It is clear it was benefited; and as at law if legal waste be committed, and the party dies, an action for money had and received lies against his representative; so upon the same principle, in cases of equitable waste, the party must through his representatives refund in respect of the wrong he has done." The case was decided by Sir THOMAS PLUMER upon the broad prin-

[1] 6 Ves. 73. [2] 1 Cowp. 371. [3] 1 Madd. 116. [4] 1 Madd. 139.

ciple that where equitable waste had been committed the court had jurisdiction to make the representatives of the party committing such waste accountable.

Again, in Monypenny *v.* Bristow[1] the bill was filed by the heir of a testator against the personal representative of his widow, who, with the acquiescence of his heir, had been let into possession of certain freehold houses, under an erroneous supposition that they passed by the will along with other property in which a life interest was devised to her. She died before the error was discovered. The bill prayed delivery of the title-deeds and an account of the rents received by the widow during her continuance in possession. It was urged by way of defence that these rents, being wrongfully received by the widow, could have been recovered in her lifetime only by an action of trespass, and that this suit being founded in tort died with her, but this contention was rejected by the Master of the Rolls, Sir John Leach, who, after referring to the judgment in Hambly *v.* Trott,[2] decreed the account prayed. There was an appeal to the Lord Chancellor, Lord Brougham, who dismissed the appeal and affirmed the decree of Sir John Leach.

The last case in equity to which I will refer is that of Peek *v.* Gurney.[3] In that case it was sought to make the estate of Mr. Gibbs liable for a misrepresentation made by him in conjunction with other directors of a company formed under the Companies Act. His executors contended that the suit was in effect a proceeding to recover damages for a wrong done by Mr. Gibbs, and that the maxim *actio personalis moritur cum persona* applied. But the plaintiffs failed in their case as against the executors of Mr. Gibbs on the express ground that Mr. Gibbs' estate had derived no benefit from the misrepresentation to which he was a party.

The general result of these cases, and of others to the like effect, may be thus stated, that a court of equity will give effect to a demand against the estate of a deceased person in respect of a wrongful act done by him, if the wrongful act has resulted in a benefit capable of being measured pecuniarily, and if the demand is of such a nature as can be properly entertained by the court. The principles thus acted upon by courts of equity are in accordance with the conclusions enunciated by Lord Mansfield with reference to actions at common law which survive or die on account of the cause of action; but as regards those actions which at common law survive or die on account of the form of action, courts of equity will not permit the justice of the case to be defeated by reason of the technicalities of particular procedure. That the demand of the plaintiffs in this suit was one proper to be made in a court of equity cannot be disputed; the decree is conclusive on this point. Upon the question whether the wrongful act resulted in a benefit to the estate of the wrong-doer I think the proper inquiry is that suggested by Sir Thomas Plumer, "Did the wrong-doer derive any

[1] 2 Russ. & My. 117. [2] 1 Cowp. 371. [3] L. R. 6 H. L. 377.

benefit from the wrong done by him, or was it a naked injury by which his estate was in no way benefited?" My answer to that inquiry, as applied to the circumstances of the present case, is that the estate of the defendant R. Fothergill, was benefited by the wrongful user by the defendants of the roads and passages under the plaintiff's farm. Indeed the decree, as varied by Lord HATHERLEY and as explained by him, appears to me to be conclusive on this point also. If the views which I have expressed are correct, it would follow that had no suit been instituted against the defendant R. Fothergill, a suit to the like effect as regards the subject-matter of the second and third inquiries might have been commenced and prosecuted after his death against his executrix. Does the fact, that the suit was commenced against him and abated upon his death, make any difference? Can it be said that the suit survives as regards part of the relief prayed, but has died as regards the subject-matter of the second and third inquiries? I think not. The decision of Lord HARDWICKE in Garth *v.* Cotton[1] was upon a bill of revivor against the representative of a defendant to the original bill, and that in the case of the Marquis of Lansdowne was upon a demurrer to a supplemental bill filed against the representative of the Marquis, who was a defendant to the original bill.

For these reasons the appeal of Mrs. Fothergill ought, in my opinion, to be dismissed. I think, also, that the appeal of the plaintiffs as regards the 4th inquiry fails, inasmuch as the wrongful acts which are the subject of it, though occasioning injury to the plaintiffs, did not result in any profit to the wrong-doers.

THE PEOPLE *v.* GIBBS AND ANOTHER, EXECUTORS OF GIBBS, LATE SHERIFF OF WASHINGTON.

IN THE SUPREME COURT OF JUDICATURE OF NEW YORK, MAY, 1832.

[*Reported in* 9 *Wendell*, 29.]

THIS action, tried at the Washington circuit in November, 1830, before the Hon. ESEK COWEN, one of the circuit judges, was brought to recover the balance of a sum of money directed to be levied on a warrant issued by the treasurer of the county of Washington, commanding the sheriff of that county to levy of the goods, &c. of one J. J. Sherwood, $1743.05, being the balance of a certain tax, for the collection of which a tax roll and warrant in due form had been delivered to Sherwood as collector of the town of Salem, and which sum remained due and unaccounted for by him. The warrant against the collector was delivered to a deputy of the sheriff, and $343.39 remaining unaccounted for by the sheriff, and the warrant not having been returned to the treasurer, this action was brought. The

[1] 1 Dick. 215.

declaration was in assumpsit, containing the common money counts and an account stated: the defendants pleaded the general issue. On the above facts appearing, the counsel for the defendants insisted that the action did not lie against the executors of the sheriff, it being in its nature *ex delicto* and falling within the rule *actio personalis moritur cum persona*. The presiding judge decided that the action could not be sustained, unless it was proved that the balance claimed had been actually received by the sheriff in his lifetime, or by his deputy; and no such proof being given, the judge instructed the jury to find a verdict for the defendants, who found accordingly. The counsel for the people excepted to the decision and charge of the judge, and moved for a new trial.

Greene C. Bronson, Attorney-General, for the people.

J. Willard and *D. Russell*, for defendants.

By the Court, Savage, Ch. J. By the laws relating to taxes, every collector is required to settle his account with the county treasurer within one week after the time mentioned in his warrant. If the collector refuses or neglects to pay to the county treasurer the amount of taxes contained in the assessment roll, or to account for the same in the manner prescribed by the statute, the county treasurer is required to issue his warrant to the sheriff of the county, commanding him to cause the amount specified to be levied of the goods and chattels, lands and tenements of the collector. If the sheriff neglects to return such warrant or pay the money levied thereon within the time limited, he is declared liable to pay the amount of the warrant to the people of the State, to be recovered in an action for so much money received to their use. The county treasurer certifies the default of the sheriff to the comptroller, and he gives notice thereof to the Attorney-General, whose duty it is to prosecute the sheriff.[1] This action is brought under this statute.

It is not denied that the action would lie against the sheriff himself upon the facts proven in this case; but it is contended that the action, though in form *ex contractu*, is one actually in tort; that it is for a nonfeasance in his office, and does not survive against his representatives. The action against the sheriff himself would lie, not because money had been received by him, but because he had been guilty of official negligence, for which the legislature have said he might be made liable in this form of action.

There seems to have been some difficulty in the application of the principle *actio personalis moritur cum persona*. To a certain extent there is no difficulty. Actions upon contracts relating to property survive; executors and administrators are the representatives of the property, that is, personal property of the deceased, — they represent the goods and chattels, rights and credits of the deceased. Actions for wrongs for personal injuries do not survive, for executors and administrators do not represent the wrongs

[1] 2 R. L. 513, 14.

of the deceased, except as far as their personal property is affected. In all the recent adjudications and elementary works, the case of Hambly *v.* Trott [1] is referred to as containing the correct doctrine on this point. That was an action of trover against the executor, or rather administrator, with the will annexed, for a conversion by the testator. Lord MANSFIELD, in giving the opinion of the court, considers two classes of cases: 1. Actions which either survive or die on account of the cause of action; 2. Those which survive or die on account of the form of action. As to the first class, which alone it is important to consider here, the rule laid down by Lord MANSFIELD is, that the action survives when the cause of action is money due on a contract, express or implied, or gain by the work or property of another; but where the cause of action is tort, there the action dies. He specifies battery, false imprisonment, trespass, words, nuisance, obstructing lights, diverting a water-course, escape against the sheriff, and cases of the like kind. A general rule is subsequently laid down which has ever since been considered correct: "If," says he, "it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer, as beating or imprisoning a man, then the person injured has only a reparation for the *delictum* in damages to be assessed by a jury; but where, besides the crime, property is acquired, which benefits the testator, then an action for the value of the property shall survive against the executor; as for instance the executor shall not be chargeable for the injury done by his testator in cutting down another man's trees, but for the benefit arising to his testator for the value or the sale of the trees, he shall." For the offence itself, the executor is not responsible; but so far as the act of the offender is beneficial to his estate, his assets ought to be answerable. This is the common-law rule, and under it an action of trover would not lie against the executor for property converted by the testator.[2] But by our statute, 1 R. L. 311, 312, the action of trespass is given by and against executors and administrators for property taken and converted by the testator or intestate in his lifetime. It was decided in this court in Martin *v.* Bradley,[3] that debt will not lie against the administrator of a sheriff for an escape in the lifetime of the intestate; and in Franklin *v.* Low & Swartwout,[4] it was held that an action would not lie against the representatives of a deceased postmaster for the misconduct of his clerk. In this case, Mr. Justice SPENCER cites with approbation the doctrine of Lord MANSFIELD in Hambly *v.* Trott, and also Bailey *v.* Birtles,[5] referred to and relied on in Hambly *v.* Trott, where it was held trover would not lie. In McEvers *v.* Pitkin, late sheriff,[6] it was decided that the administrator of a deceased sheriff was not liable in an action for the default of one of the sheriff's deputies in not executing and returning a writ of execution, on the ground that the action was for a tort or misfeasance of the sheriff by

[1] Cowp. 371. [2] Toll. Ex. 460, 2. [3] 1 Cai. 124.
[4] 1 Johns. 402. [5] T. Raym. 71. [6] 1 Root, 216.

his deputy, which was personal and died with the person. In Cravath *v.* Plympton,[1] it was held that no action lay against the executor of a deputy sheriff for a nonfeasance of the deputy in neglecting to levy an execution for the plaintiff on the body of his debtor. In all these cases the courts refer to, and rely upon the case of Hambly *v.* Trott. In Cravath *v.* Plympton, PUTNAM, Justice, states the principle to be, that where the deceased by a tortious act acquired the property of the plaintiff, as by cutting his trees and converting them to his own use, although trover does not lie, yet the plaintiff may recover the value of his trees in some other form of action; but where, by the act complained of, the deceased acquired no gain, although the plaintiff may have suffered great loss, then the rule applies, *actio personalis moritur cum persona.* The cases of Cutler & Hay *v.* Brown's Ex'rs,[2] and Ex'rs of Crane *v.* Crane,[3] do not establish a different rule, nor are they at all at variance with the other cases referred to. The first states that an action for enticing away the plaintiff's slave will lie against executors for the same reason that trover will; that is the whole case. If it is intended in a case where the testator's estate was benefited, as I presume it is, then there is no objection to it; if anything else is meant, it is incorrect. The other case was assumpsit against executors for wood cut and sold by the testator; it is the precise case supposed by Lord MANSFIELD in Hambly *v.* Trott.

Were it not for the statute allowing an action for money had and received to be brought against the sheriff in a case like the present, the action must have been an action on the case against the sheriff for the default of his deputy in neglecting to return an execution (for the warrant in this case was in the nature of an execution,) and then it would be like the case of McEvers *v.* Pitkin. It is analogous in principle with the action of debt for an escape; there, as here, the action is in form *ex contractu*, but in substance *ex delicto*; yet the form of the action does not vary the cause of action, and when that is *ex delicto*, and not beneficial to the estate, no action lies against the representative of the estate.

I am satisfied, therefore, that the learned circuit judge was correct, and a new trial should be denied.

[1] 13 Mass. 454. [2] 2 Hayw. 182. [3] 4 Hals. 173.

this is the earliest case of a quasi Contract enforced. the Contract executed and executory took place.

CHAPTER II.

FAILURE OF CONSIDERATION.

SECTION I.

MISTAKE.

(a) Mistake may be as to Law or Fact.

HEWER *v.* BARTHOLOMEW.

IN THE KING'S BENCH, TRINITY TERM, 1598.

[*Reported in Croke, Elizabeth,* 614.]

ACCOMPT, supposing that he received £100 by the hands of John Coventry. The defendant pleaded *ne unques son receiver* by the hands of John Coventry to render accompt, etc.; and thereupon they were at issue. The jury found, that Bartholomew paid that £100 to Hewer the plaintiff, in redemption of a mortgage; and he commanded his servant to put it in his closet; who did so. Afterwards Bartholomew demanded of the plaintiff certain evidences and bonds, which he refused to deliver. The defendant then required that he might have his money again, which he then had paid. The plaintiff thereupon commanded his servant John Coventry, that he should fetch back the said £100 *ad redeliberandum* to the foresaid J. Bartholomew the said £100 by him paid; and that the said John Coventry did fetch again the same money, and poured it forth upon the table *eidem* J. Bartholomew *ea intentione, ut idem* J. Bartholomew *suas centum libras prædict. quas idem* J. Bartholomew to the said plaintiff had paid *reciperet in præsentia* of the plaintiff; and the plaintiff then and there did will the defendant *ad recipiendum* the foresaid £100 *per ipsum defendentem præfato querenti, ut præfertur, solut. quas* £100 *idem defendens adtunc et ibidem recepit, et asportavit. Et si super tota materia, etc.*

And all the court resolved, that this payment was a good discharge of the mortgage; and although he afterwards required it again, as his own money, yet it shall not avoid that which was absolutely paid; but the mortgage remains absolutely discharged; and the monies were the plaintiff's own monies. And although he delivered them to the defendant as his own, not knowing the law therein, supposing it to be no payment, yet in regard he did not give it otherwise, nor upon other consideration, the defendant received them as the plaintiff's money, and is accountable for them.

Secondly, POPHAM and GAWDY held, that this was not any receipt by the hands of J. Coventry, but by the hands of the plaintiff himself; for when he willed the defendant to receive it, it was his own delivery; and when he commanded his servant to fetch it *ad deliberandum* to the defendant, and he brought it down and poured it forth *ea intentione* that the defendant should receive it, that is not any authority to the servant to deliver it, nor did he by that act deliver it. But POPHAM said, if he had commanded his servant to bring the said money, and deliver it to the defendant, and he had done it in the presence of his master, and the master had required the other to receive it, that peradventure might have been a receipt by the hands of the servant.

FENNER held the contrary in this point, for he conceived it to be a delivery by the servant, because he fetched it down, and poured it forth to the other to receive it. And CLENCH doubted. *Et adjournatur.*

But afterwards the plaintiff discontinued his suit, and brought a new action, supposing the receipt by his own hands.

JACOB BONNEL *v.* JOHN FOUKE, ALDERMAN OF LONDON.

IN THE UPPER BENCH, MICHAELMAS TERM, 1657.

[*Reported in* 2 *Siderfin*, 4.]

THE plaintiff being one of the colemeeters of London, for which he was to pay £80 per annum, the special matter was found to be that by divers charters the Kings of England have granted and confirmed to the Mayor and Aldermen of London, the measuring of cloths, as well woollen as linen, silks, etc., and the weighing and measuring of fruit, fish, coals, etc., both in the port of London and on the Thames from Stanesbridge to London bridge, and thence to Medway near the sea, as also upon the river Medway, of all such goods landed upon the banks within the said space before limited; and it was found that in ancient times there were but four colemeeters, and afterwards six were appointed, and later eight. And in the third year of King James it was enacted by the Common Council of London (which has as much power within the walls of London as an act of Parliament without) that there should be ten colemeeters, eight of whom should pay their rent to the Lord Mayor for the time being, for the maintenance of his honorable house, while the other two should pay their rent to the Chamberlain of London. The plaintiff was one of these two. About the year 1652 (as I remember), when the defendant was Mayor, he demanded of the plaintiff the said rent, who paid it quarterly and holds several receipts of this tenor: Received of J. B., one of the colemeeters of the city of London, the sum of £20 for his rent, by me, J. F., Lord Mayor,

etc. Afterwards the rent was demanded of the said defendant [plaintiff?] by the Chamberlain of the city, and he paid the said rent to the Chamberlain, and therefore brought assumpsit, namely, *indebitatus assumpsit*, against the defendant Fouke. It was adjudged that the action well lies.

As if one comes to me and says: Pay me my rent, I am your landlord; and I answer: Give me your receipt and you shall have it, and so I pay, and afterwards another who has right comes and demands the rent, and I pay him, I may have *indebitatus assumpsit* against him who gave me the first receipt.

And if I pay money in satisfaction of a duty, and he to whom it is paid has no title to receive it, and so the duty is not satisfied, he to whom the money was paid is thereby indebted to me, and therefore I may maintain an action against him as well as against one who has no title to demand rent.

TURNER *v.* TURNER.

In Chancery, 1680.

[*Reported in* 2 *Reports in Chancery, 3d Ed.*, 81.]

That the plaintiff's father lent to Ayloff £700, and at another time £200, for which Ayloff mortgaged lands to the plaintiff's father and his heirs, with proviso, that on payment of £600 to the said plaintiff's father or heirs, then the premises to be reconveyed to Ayloff; that the plaintiff is executor to his father and brothers, and so claims the mortgages as vesting in the executors of his father, and not in his heirs.

The defendant, being the son and heir of the plaintiff's eldest brother deceased, and grandson and heir to the plaintiff's father, insists that the plaintiff and defendant, and others who claimed several shares and parts of the plaintiff's father's personal estate, agreed to a division thereof amongst themselves; and a division was made, and releases given of each one's demands, in law or equity to the said estate, and the plaintiff in particular released, and the said Ayloff's mortgage, with the money due thereon with other things, was set out and allotted to the defendant by consent of all the parties, and received by the defendant in part of his share, and the plaintiff accounted to the defendant for the profits of the said Ayloff's mortgaged premises received by him, and afterwards in 1664 the defendant had a decree for the mortgage money against Ayloff's executor, and received the same, to which proceedings the plaintiff was privy, and the defendant says it is unreasonable that the plaintiff should now make a demand to the said mortgage, to unsettle matters so settled by his own consent; but the plaintiff insists he looked on the premises at that time to come to the defendant

as heir, and knew not his own title thereto, and the shares set out came but to £250 apiece, and Ayloff's mortgage was worth £8000.

This Court is of opinion that the plaintiff ought to be relieved, and had an undoubted right to the said mortgaged premises, and decreed the defendant to repay all the money received by him thereon to the plaintiff.

LANSDOWNE *v.* LANSDOWNE.

In Chancery, before Lord King, C., June 15, 1730.

[*Reported in* 2 *Jacob & Walker*, 205.[1]]

Mary Lansdowne, having four sons, Richard, John, Thomas, and William, by settlement limited to each of them in fee a part of her real estates, after her death. The plaintiff was the son and heir of Richard. John died without issue, having devised his share to Thomas, and Thomas afterwards died without issue and intestate. On this a question arose between the plaintiff and William as to the right of succession to Thomas; after consulting with one Hughes, they agreed to divide the lands between them, and in pursuance of the agreement they executed first a bond, and afterwards conveyances of the shares fixed on for each.

The plaintiff sought to be relieved against these instruments, alleging by his bill that he had been surprised and imposed upon by Hughes and William Lansdowne. Hughes was made a defendant to the bill; the other defendant was the infant son and heir of William, who had died before the commencement of the suit. Hughes, in his answer, admitted that he had given his opinion that William was the heir at law of Thomas, "being," as he said, "misled herein by a book which this defendant then had with him, called The Clerk's Remembrancer." He recommended them to take further advice, which they at first intended to do, but the plaintiff afterwards voluntarily told him, "That if his cousin William would, he would agree to share the land between them, let it be whose right it would, and thereby prevent all disputes and lawsuits."

The decree declared, that it appeared that the bond and indentures were obtained by a mistake and misrepresentation of the law, and ordered them to be given up to be cancelled. The bill was dismissed, as against Hughes, without costs.[2]

[1] Reported also in Moseley, 364. — Ed.

[2] In Moseley, 364, the Lord Chancellor is reported as saying in this case: —

"That maxim of law, *ignorantia juris non excusat*, was in regard to the public, that ignorance cannot be pleaded in excuse of crimes, but did not hold in civil cases." — Ed.

BINGHAM *v.* BINGHAM.

Before William Fortescue, M.R., October 27, 1748.

[*Reported in* 1 *Vesey, Senior*, 126.]

An agreement was made for the sale of an estate to the plaintiff by defendant, who had brought an ejectment in support of a title thereto under a will.[1]

The bill was to have the purchase-money refunded, as it appeared to have been the plaintiff's estate.

It was insisted, that it was the plaintiff's own fault, to whom the title was produced, and who had time to consider it.

Decreed for the plaintiff with costs, and interest for the money from the time of bringing the bill; for though no fraud appeared, and the defendant apprehended he had a right, yet there was a plain mistake, such as the court was warranted to relieve against, and not to suffer the defendant to run away with the money in consideration of the sale of an estate to which he had no right.

FARMER *v.* ARUNDEL.

In the Common Pleas, Trinity Term, 1772.

[*Reported in* 2 *William Blackstone*, 824.]

Assumpsit for money had and received to the plaintiff's use, and for money lent and advanced, and for money laid out and expended by the plaintiff for the defendant. On *non assumpsit* pleaded and issue thereon, the case, upon trial at last Worcester Assizes before Mr. Justice Nares, appeared to be, — "That the plaintiff was overseer of Grimley, in Co.

[1] The material facts were as follows: One John Bingham (*inter alia*) devised an estate tail in certain lands to Daniel his eldest son and heir, limiting the reversion in fee to his own heirs. Daniel left no issue, but devised this estate to the plaintiff in fee. The bill stated that the latter, being ignorant of the law, and persuaded by the defendant, and his scrivener and conveyancer, that Daniel had no power to make such devise, and being also subjected to an action of ejectment, purchased the estate of the defendant for £80; and that it was conveyed to him by lease and release. The bill was to have this money repaid with interest. The defendant by his answer first of all insisted, that Daniel had no power to make such devise; but if he had, he urged that the plaintiff should have "been better advised before he parted with his money, for that all purchases were to be at the peril of the purchaser." The decree was for the money, with interest and costs. *Belt's Supplement to Vesey*, 79. — Ed.

Worcester, and the defendant of St. Martin's, in Worcester city. That, in 1724, Richard Lamb was certificated by the parish of Grimley to St. Peter's, in Worcester, or any other parish in the said city. On the 14th of March, 1771, a common order of removal was made by two justices to remove Lamb and his family from St. Martin's to Grimley. The defendant, meeting the plaintiff in the city of Worcester, produced the pauper and his family to him, and acquainted him with the order. Whereupon the plaintiff received the paupers; and the defendant then demanded payment of a bill of 8*l.* 9*s.* 10*d.* for money expended by St. Martin's in maintaining the pauper and his family for the last four years, which the plaintiff accordingly paid. That the pauper still continuing in St. Martin's, another order of two justices was made on the 11th of September, 1771, for his removal, but in neither of the orders is any mention made of the certificate. To this order Grimley appealed, and the Sessions confirmed the same, but made no order for costs." And this action is now brought to recover back this sum of 8*l.* 9*s.* 10*d.*, which the plaintiff says he paid in his own wrong.

Walker, for the plaintiff, argued that the defendant, having no right to demand, had therefore no right to retain this money; that the pauper was not certificated to St. Martin's, but St. Peter's; and that, under stat. 8 & 9 W. 3, c. 30, the certificate must be to some particular place; that stat. 3. Geo. 2, c. 29. [s. 9.] provides for reimbursing the expenses of certificated persons, to be liquidated by a justice of peace. This certificate is three years prior to that act, and that act recites that the expense could not then be recovered by law. The remedy pointed out by that act has not been pursued, even granting the certificate to extend to the parish of St. Martin's.

Burland, for the defendant, insisted, that the direction was surplusage; for certificates need not be directed at all;[1] but when once delivered, it is satisfied, and cannot be used again: High and Low Bishopside;[2] that stat. 3 Geo. 2 extends to all removals subsequent to that act under certificates, whenever given, and that the justice is only to liquidate in case of a dispute, not where the sum is admitted, as in the present case; that there are many cases where a man has no right to demand money, which yet (if voluntarily paid him) he may retain, — as debts of honor or gratitude, and bounties.

De Grey, C. J. — When money is paid by one man to another on a mistake either of fact or of law, or by deceit, this action will certainly lie. But the proposition is not universal, that whenever a man pays money which he is not bound to pay he may by this action recover it back. Money due in point of honor or conscience, though a man is not compellable to pay it, yet if paid, shall not be recovered back, — as a *bona fide* debt, which is barred by the statute of limitations. Put the form of the certifi-

[1] St. Nicholas Harwich and Wolferstan. Str. 1163.

[2] T. 28 Geo. 2, Burr. Settlem. Cases, 381.

cate out of the case, it is however evidence, at all events, that the parish of Grimley have acknowledged the pauper to be their parishioner. And it is allowed, that he has been maintained four years by the parish of St. Martin's. Admitting, therefore, that this money could not have been demanded by the defendant (which it is not now necessary to decide), yet I am of opinion that it is an honest debt, and that the plaintiff, having once paid it, shall not, by this action, which is considered as an equitable action, recover it back again.

GOULD, BLACKSTONE, NARES, Js., of the same opinion.

Judgment for the defendant.

BIZE *v.* DICKASON, AND ANOTHER, ASSIGNEES OF BARTENSHLAG.

IN THE KING'S BENCH, JUNE 23, 1786.

[*Reported in* 1 *Term Reports*, 285.]

THIS was an action for money had and received by the defendants, as assignees of the bankrupt, for the plaintiff's use. Plea, the general issue.

The cause came on to be tried at the sittings after Easter Term, 1786, at Guildhall, London, before BULLER, Justice, when the jury found a verdict for the plaintiff; damages 661*l.* 9*s.* 10*d.* and costs 40*s.*, subject to the opinion of the Court on the following case: —

That the bankrupt John Rodolph Bartenshlag, being an underwriter, subscribed policies filled up with the plaintiff's name for his foreign correspondents, who were unknown to the bankrupt.

That losses happened on such policies to the amount of 655*l.* 9*s.* 7*d.* before the bankruptcy of Bartenshlag, and were adjusted by him. That a loss on another policy to the amount of 6*l.* 0*s.* 3*d.* happened before the said bankruptcy, but was not adjusted till after such bankruptcy.

That the plaintiff paid the amount of the losses to his foreign correspondents after such bankruptcy.

That the plaintiff had a commission *del credere* from his correspondents, was made debtor by the bankrupt for the premiums, and always retained the policies in his hands.

That a dividend of 10*s.* in the pound was declared under the said commission on the 15th of June, 1782.

That at the time of the bankruptcy there was due from the plaintiff to the bankrupt the sum of 1356*l.* 0*s.* 3*d.* And there was due from the bankrupt for the above losses 661*l.* 9*s.* 10*d.*

That on the 15th of March, 1782, the plaintiff paid to the defendants the sum of 750*l.*, and on the 17th of November, 1785, the further sum of 606*l.* 0*s.* 3*d.*, amounting to 1356*l.* 0*s.* 3*d.*

And on the 18th November, 1785, the plaintiff proved the said sum of 661*l.* 9*s.* 10*d.* under the said commission.

That the plaintiff never received any dividend under the commission for or on account of the said losses.

That a final dividend of the effects of the said bankrupt was declared by the said commissioners on the 24th day of January, 1786.

That on the 1st of February, 1786, previous to such dividend being paid, the plaintiff caused a notice to be served on the defendants, purporting that he had paid them the said sum of 1356*l.* 0*s.* 3*d.* under a mistaken idea, without deducting therefrom the said 661*l.* 9*s.* 10*d.* for the aforesaid losses on the said several policies subscribed by the bankrupt, for whom he was *del credere* to the said foreign correspondents, and had paid such losses accordingly; and cautioning them against making any dividend until he was paid the said sum of 661*l.* 9*s.* 10*d.*

That there is now in the hands of the said defendants effects of the bankrupt more than sufficient to satisfy the demand of the plaintiff.

The question for the opinion of the Court is, Whether the plaintiff is entitled to recover in this action? If the plaintiff is entitled to recover in this action the verdict to stand. But if the Court shall be of opinion that the plaintiff is not entitled to recover, then a verdict to be entered for the defendants.

Smith was to have argued for the plaintiff, but *Mingay* for the defendants declined arguing the case.

The Court being of opinion that it came within the principle of the case of Grove *v.* Dubois;[1] and —

Lord Mansfield, Ch. J., said, The rule had always been, that if a man has actually paid what the law would not have compelled him to pay, but what in equity and conscience he ought, he cannot recover it back again in an action for money had and received. So where a man has paid a debt, which would otherwise have been barred by the statute of limitations; or a debt contracted during his infancy, which in justice he ought to discharge, though the law would not have compelled the payment, yet the money being paid, it will not oblige the payee to refund it. But where money is paid under a mistake, which there was no ground to claim in conscience, the party may recover it back again by this kind of action.

Judgment for the plaintiff.

[1] 1 T. R. 112.

BILBIE *v.* LUMLEY AND OTHERS.

IN THE KING'S BENCH, JUNE 28, 1802.

[*Reported in* 2 *East*, 469.]

THIS was an action for money had and received, and upon other common counts, which was brought by an underwriter upon a policy of insurance, in order to recover back 100*l.* which he had paid upon the policy as for a loss by capture to the defendants, the assured. The ground on which the action was endeavored to be sustained was, that the money was paid under a mistake, the defendants not having at the time of insurance effected, disclosed to the underwriter (the present plaintiff) a material letter which had been before received by them, relating to the time of sailing of the ship insured. It was not now denied that the letter was material to be disclosed; but the defence rested on now and at the trial was, that before the loss on the policy was adjusted, and the money paid by the present plaintiff, all the papers had been laid before the underwriters, and amongst others the letter in question; and therefore it was contended at the trial before ROOKE, J., at York, that the money having been paid with full knowledge, or with full means of knowledge of all the circumstances, could not now be recovered back again. On the other hand, it was insisted that it was sufficient to sustain the action that the money had been paid under a mistake of the law; the plaintiff not being apprized at the time of the payment that the concealment of the particular circumstance disclosed in the letter kept back, was a defence to any action which might have been brought on the policy; and the learned judge being of that opinion, the plaintiff obtained a verdict.

A rule nisi was granted in the last term for setting aside the verdict and having a new trial, which was to have been supported now by *Park* for the defendants, and opposed by *Wood* for the plaintiff. But after the report was read, and the fact clearly ascertained that the material letter in question had been submitted to the examination of the underwriters before the adjustment, —

Lord ELLENBOROUGH, C. J., asked the plaintiff's counsel whether he could state any case where, if a party paid money to another voluntarily with a full knowledge of all the facts of the case, he could recover it back again on account of his ignorance of the law? [No answer being given, his Lordship continued:] The case of Chatfield *v.* Paxton[1] is the only one I

[1] That case came before this Court on a motion for a new trial in M. 39, Geo. 3. The circumstances were so special, and there was so much of doubt in it, that it was not thought to be of any use to report it. The outline of it was this: A mercantile house in India (of which the defendant was a surviving partner residing here at the time) received a bill drawn by the plaintiff on another house in payment of a debt, which bill the

ever heard of, where Lord KENYON at *nisi prius* intimated something of that sort. But when it was afterwards brought before this Court, on a motion for a new trial, there were some other circumstances of fact relied on; and it was so doubtful at last on what precise ground the case turned, that it was not reported. Every man must be taken to be cognizant of the law; otherwise there is no saying to what extent the excuse of ignorance might not be carried. It would be urged in almost every case. In Lowrie *v.* Bourdieu,[1] money paid under a mere mistake of the law was endeavored to be recovered back; and there BULLER, J., observed that *ignorantia juris non excusat*, &c. *Rule absolute.*

defendant's house made their own by laches; but not apprizing the plaintiff of this, they sent him back the bill protested for non-payment, and drew upon him for the same amount in favor of a mercantile house in London (some of whom, amongst others the defendant, were also partners in the house in India). The plaintiff, ignorant of the laches of the house in India, accepted the new bill; but before payment he received some information of the laches; yet not such particular proof of it as would have enabled him to defend himself against the demand upon his acceptance in a court (even if the house in India were to be considered the same as that in London). Therefore the plaintiff paid his acceptance, and afterwards brought this action to recover the money back from the defendant as a partner in the house in India, and obtained a verdict under the direction of Lord KENYON. Upon the motion for the new trial, his Lordship and ASHHURST, J. were clearly of opinion that the action was maintainable; considering as it seemed that the defendant's house in India had obtained the plaintiff's acceptance in the first instance by a fraudulent concealment of their laches, and that the plaintiff had not voluntarily and with a fair knowledge of his case submitted to pay it, but had paid it from the necessity of the thing, and under a protest that if on his arrival in India he afterwards found his suspicions confirmed he should call upon the house there to indemnify him. ASHHURST, J., added, that where a payment had been made, not with full knowledge of the facts, but only under a blind suspicion of the case, and it was found to have been paid unjustly, the party might recover it back again. That here the plaintiff was under great uncertainty of the facts at the time he accepted the bill, and even if he knew them all before actual payment yet that his knowledge would have come too late, and it would have been no answer to an action by the payees who were not parties to the transaction: but that his proper remedy was against those persons by whose misconduct he was placed in that situation. GROSE, J., said he had great difficulty in adopting the opinion of the two other Judges to the full extent of it; principally because he was not satisfied that the plaintiff had not a sufficient knowledge of the ground of his defence before payment of the bill, whatever he might have had when he accepted it; but as the verdict was with the honesty of the case, he inclined against disturbing it; and the rather, because he doubted whether the house in India and that in London were to be considered as the same, so that the plaintiff could have resisted the payment of the bill to the latter, because one of their partners (the defendant) was also a partner in the other house, though he had no knowledge in fact of the laches. LAWRENCE, J., also doubted on the former ground, as the plaintiff seemed to have been apprized before payment of the bill of the general outline of his defence; but as he was not then so conversant of the particular facts now appearing as to have been able to resist the demand then made on him if an action had been brought, but seemed to have had only a confused notion of them, expecting to be better informed when he arrived in India, he doubted how far the maxim *volenti non fit injuria* could be applied to him.

[1] Doug. 467.

SIR CHARLES BRISBANE, KNT. *v.* DACRES, Widow, Executrix of ADMIRAL DACRES.

In the Common Pleas, July 6, 1813.

[*Reported in* 5 *Taunton*, 144.]

This was an action of assumpsit for money had and received, to which the defendant pleaded the general issue, and at the trial of the cause before Mansfield, C. J., at the first sittings within Hilary Term, 1813, a verdict was found for the defendant, subject to the opinion of the court on the following case.

In the year 1804, J. R. Dacres, Esq., the defendant's testator, was appointed commander-in-chief of his majesty's ships and vessels on the Jamaica Station, and before and at the time of the sailing of H. M. S., the Arethusa, as hereinafter mentioned, she was under the command of Admiral Dacres, as such commander-in-chief, and while she continued under such his command, he, in the month of April, 1808, ordered the plaintiff (who was then captain or commander of the Arethusa, then lying off Jamaica), to receive on board thereof $700,000 belonging to government, and proceed with the same to Portsmouth. The plaintiff in pursuance of and under that order received the dollars on board, and sailed to, and delivered them at Portsmouth. The Arethusa, previous to her so sailing, also received on board $1,530,000 belonging to private individuals, which the plaintiff caused to be delivered at the Bank of England, for the use and benefit of the persons to whom they were consigned, in conformity to bills of lading signed by him for such delivery. The plaintiff on the third day of November, 1808, received through his agent, from the Bank of England, for the freight of the $1,530,000 belonging to private individuals, the sum of 7438*l.* 18*s.* 5*d.* The plaintiff also, through his agent, on the 16th day of March, 1809, received from his majesty's treasury, for the freight of the dollars belonging to government, the sum of 850*l.* net, by virtue of the following warrant: "George Rex, — Our will and pleasure is, that out of any money in your hands that may be imprested to you for this service, you do issue and pay, or cause to be issued and paid, unto our trusty and well-beloved Sir Charles Brisbane, or his assigns, the sum of 850*l.* without deduction and without account, which we are graciously pleased to allow him for freight of specie, conveyed by him on board our ship Arethusa from Jamaica to Portsmouth; and this shall be as well to you for making the said payment, as to the commissioners for auditing our public accounts, as all others concerned in passing your said accounts, for allowing the same thereupon, a sufficient warrant. Given at

St. James's, 15 November, 1808. By his majesty's command, W. Broderick, Sp. Perceval, W. S. Bourne. To the paymaster general of guards, garrisons, and land forces. Sir C. Brisbane, 850*l.*, for freight on specie conveyed by him from Jamaica to Portsmouth." When an order is so given by an admiral commanding-in-chief to a captain, the latter acts under the command of the admiral, and not under a separate admiralty order; and the Arethusa was despatched on this service by Admiral Dacres, and during the whole of such service was acting under his orders.

The case then stated the usage of the navy with respect to payment of freight on the carriage of bullion, previous to the year 1801, the discontinuance of it in that year, the correspondence between the Secretary of the Admiralty and the Secretary of the Treasury, which took place in 1807, and the orders of the Lords of the Admiralty made thereupon, in the same terms as the same are detailed in the case of Montague *v.* Janverin.[1] The case further stated that since the making of such order the captains of his majesty's navy have constantly received the allowance therein mentioned for conveying public money, and according to the usage, had been required to pay, and had paid, as well one-third thereof, as also one-third of the freight for conveying private money, to the commander-in-chief, under whose command they were; and that in the present case, the sum of 2500*l.* was on the 22d of November, 1808, paid by the prize or navy agent of the plaintiff (by whom the same had been previously received), to the late Admiral Dacres, on account, and in part payment of one-third of the freight of the money so conveyed by the Arethusa, — that is to say, the sum of 2479*l.* 12*s.* 9*d.*, for one-third of the freight of the private money, and the sum of 20*l.* 7*s.* 3*d.*, residue of the 2500*l.*, on account, and in part of one-third of the freight of the public money so conveyed by that ship, which payment was made on the behalf, and account, and with the sanction of the plaintiff, with knowledge of the circumstances before stated, but under an idea of a right in the admiral to a third of such freight, on the ground of the before-mentioned usage; and for the recovery of which sum of 2500*l.*, the present action was brought. The question for the opinion of the court was, whether under the circumstances stated the plaintiff was entitled to recover: if he was, the verdict was to be entered for the plaintiff, for such sum as the court should direct; and if not, the present verdict for the defendant was to stand.

Best, Serjt., for the plaintiff.

Lens, Serjt., for the defendant.

On this day the judges of the court delivered their opinions *seriatim*.

Gibbs, J., read the warrant. I read this particularly, because it has been contended that the terms of the warrant give the reward to the captains exclusively. I do not know that it is necessary for me to state the correspondence; the sum of it is this, that the Lords of the Treasury proposed

[1] 4 Taunt. 446.

to the Lords of the Admiralty that a certain sum should be paid to the commanders of ships of war which should carry dollars; the Admiralty fell into this, and agreed that an allowance should be made to the commanders of such ships as shall carry treasure; the purpose of setting out these letters is, to show that the terms of them apply only to the captains commanding these ships, without any reference to the admirals. The case then states that the payment was made on the behalf and account and with the sanction of the plaintiff, but under an idea that he was bound to pay it under the practice. With respect to the freight of private dollars, we are all agreed; and as Captain Brisbane had no right to carry those dollars at all, and stipulated for and received a freight to which he had no right, and afterwards, in pursuance of an understanding with Admiral Dacres, imparted a part to him in manner agreed on; we are all of opinion, that this carrying of the dollars was an illegal transaction, that the whole which followed was tainted with the same illegality, and that the money paid cannot be recovered at all, inasmuch as the captain could not lawfully employ the ship and crew, which ought to be employed in the service of his majesty, in carrying bullion for individuals. I think as to the 20*l.*, he cannot recover back the one-third of that. We must take this payment to have been made under a demand of right, and I think that where a man demands money of another as a matter of right, and that other, with a full knowledge of the facts upon which the demand is founded, has paid a sum, he never can recover back the sum he has so voluntarily paid. It may be, that upon a further view he may form a different opinion of the law, and it may be, his subsequent opinion may be the correct one. If we were to hold otherwise, I think many inconveniences may arise. There are many doubtful questions of law: when they arise, the defendant has an option either to litigate the question, or to submit to the demand and pay the money. I think, that by submitting to the demand, he that pays the money gives it to the person to whom he pays it, and makes it his, and closes the transaction between them. He who receives it has a right to consider it as his without dispute: he spends it in confidence that it is his; and it would be most mischievous and unjust, if he who has acquiesced in the right by such voluntary payment should be at liberty, at any time within the statute of limitations, to rip up the matter, and recover back the money. He who received it is not in the same condition; he has spent it in the confidence it was his, and perhaps has no means of repayment. I am aware cases were cited at the bar, in which were *dicta* that sums paid under a mistake of the law might be recovered back, though paid with a knowledge of the facts; but there are none of these cases which may not be supported on a much sounder ground. In the case of Farmer *v.* Arundel,[1] De Grey, C. J., indeed says: "When money is paid by one man to another on a mistake either of fact or of law, or by deceit, this action (of money

[1] 2 Bl. R. 825.

had and received) will certainly lie." Now the case did not call for this proposition so generally expressed; and I do think, that doctrine, laid down so very widely and generally, where it is not called for by the circumstances of the case, is but little to be attended to; at least it is not entitled to the same weight in a case where the attention of the court is not called to a distinction, as it is in a case where it is called to the distinction. Now in the very next case cited, Lowry *v.* Bourdieu,[1] which was so early as 21 G. 3, the distinction is taken. After the other judges, BULLER, J. says: "I am clear that the plaintiff ought not to recover, for there is no fraud on the part of the underwriters; and in a case where there is no mistake of fact, or ignorance of fact, the money cannot be recovered back, for the rule applies, that *ignorantia legis non excusat.*" This distinction was thus pointedly stated in the presence of Lord MANSFIELD, who heard it, and whose attention must be called to it; and he at the end of the case guards the world against the conclusion that in no case can money paid on an illegal transaction be recovered back; for in case of extortion, he says, it may. I mention this to show, that although Lord MANSFIELD spoke immediately after BULLER, J., and must have heard and noticed his doctrine, he expresses no dissatisfaction with it. The next case is Bize *v.* Dickason,[2] an action brought by an insurance-broker to recover back from the assignees of a bankrupt so much of a sum of money which the plaintiff had paid to the assignees for a debt due to the bankrupt, as the plaintiff might have deducted by way of set-off by reason of losses which had accrued before the bankruptcy upon policies effected by the plaintiff and subscribed by the bankrupt. It is most certain that the only question brought under the consideration of the court in that case was, whether the right of the broker, who had a *del credere* commission to make the deduction, ranged itself under the case of Grove *v.* Dubois,[3] and *Mingay* declined all argument, and gave up the case. It was taken for granted without argument, that if the plaintiff would have had a right to make the deduction before payment, he might recover back the amount after payment. Lord MANSFIELD mentioned in his judgment many cases where money paid could not be recovered back, although, if it had not been paid, it could not have been enforced; and he concludes by saying, that where money is paid under a mistake, which there was no ground to claim in conscience, it may be recovered back. Mistake may be a mistake of law or of fact; but I cannot think Lord MANSFIELD said "mistake of law;" for Lord MANSFIELD had, six years before, in Lowry *v.* Bourdieu, heard it said, "money paid in ignorance of the law could not be recovered back," and had not dissented from the doctrine; and BULLER, J., sate by him, who had expressly stated the distinction six years before in Lowry *v.* Bourdieu, and would not have sate by and heard the contrary stated without noticing it. Lord MANSFIELD'S *dictum* is, that money paid by mistake, which could not be claimed in conscience,

[1] Doug. 471. [2] 1 T. R. 285. [3] 1 T. R. 112.

might be recovered back. I have, however, considerable difficulty in saying that there was anything unconscientious in Admiral Dacres, in requiring this money to be paid to him, or receiving it when it was paid. Ever since the date of this correspondence, it had been the practice of the admirals to receive this; their right to it had never been questioned at the time when Admiral Dacres received this sum. Chatfield *v.* Paxton, B. R., 39 G. 3, Mich. Term. A bill had been paid by the plaintiff to the defendant's house in India, which was dishonored in consequence of the defendants having been guilty of laches, which they did not disclose. The bill was protested and sent back to England, and the plaintiff was called on in England to pay it, certainly under an ignorance of the circumstances which had taken place in India. In consequence of this demand he accepted another bill; and before that bill was mature, a correspondence took place, which, as I contended, informed the plaintiff of all the circumstances attending the presenting of the first bill, and showed that Chatfield need not have accepted that second bill, and therefore that he need not have paid it; but he did pay it, and I, for the defendant, contended that either he ought, relying upon that defence, not to have paid it, or that having paid it he could not recover it back. Lord KENYON at *nisi prius* commented on the letters: one said that the plaintiff was going to Bengal, where he hoped to gain a more full knowledge of the case. Lord KENYON stated, that although the letters might amount to evidence of knowledge of the facts, they did not show an acquiescence in the loss of the money, and he thought a payment made under an ignorance of the law would enable the plaintiff to recover back the money. He also added, that perhaps the party, though he know both the law and the fact, yet if he paid both under fear of arrest, for want of evidence to maintain his case, might afterwards recover it; to that doctrine I acceded, and still accede; but I moved for a new trial, on the misdirection of the judge upon the first point, that money paid under ignorance of the law, with knowledge of the facts, might be recovered back; whereas, I said, if it had been paid with ignorance of the facts, but with knowledge of the law, it might be recovered. On the discussion of the rule *nisi*, not one of the court espoused the doctrine of Lord KENYON or attempted to support it, but they recurred to the letters, and found those passages in them, from whence they inferred that the plaintiff was ignorant of a part of the facts: it was a very complicated case. Lord KENYON at that time, and ASHHURST, J., put it wholly on the ground of the plaintiffs not having had a knowledge of the facts. They go on to say, that where a man pays without knowledge, but only with a blind suspicion of the facts, still he may recover. GROSE, J., doubts whether the plaintiff was not acquainted with the facts before he paid the bill; but he tacitly admits that if the plaintiff did know the facts, then the money could not be recovered: so that he must be considered as being clearly of opinion, that if it was paid with a knowledge of all the facts, it

could not be recovered back: and LAWRENCE, J., doubted, not whether the plaintiff had knowledge of the law, but of the facts; for that although the plaintiff seemed to have been apprized before he paid the bill, of the general outline of his defence, he was not then so conversant with the particular facts now appearing, as to have been able to resist the demand then made on him, if an action had been brought. Here then is, I may say, the ultimate opinion of Lord KENYON, for he first directed the jury it might be recovered back if paid with a knowledge of the facts but without knowledge of the law, which opinion he wholly afterwards abandons. Among all the practitioners of the court of King's Bench, where questions of this sort very frequently arise on insurance transactions, we were universally of this opinion, that where the money was paid with a knowledge of the facts, it could not be recovered back. One underwriter chose to pay rather than resist, another resisted and succeeded; in all similar cases it would be very easy to say, "I paid this without a knowledge of the law, and therefore may recover it back." Our only question, then, in all cases was, whether the facts were known. This was the universal practice, till Bilbie *v.* Lumley,[1] occurred: that case was tried at York, before ROOKE, J., who ruled differently: after the report was read, Lord ELLENBOROUGH asked *Wood*, B., then of counsel for the plaintiff, whether he could find any case which would support it; and he cited none. Lord ELLENBOROUGH said he never heard of any, except Chatfield *v.* Paxton, and that it was so doubtful at last upon what precise ground that case turned that it was not reported, and the rule was made absolute for a new trial. Now this was a direct decision upon the point, certainly without argument; but the counsel, whose learning we all know and who was never forward to give up a case which he thought he could support, abandoned it. In Herbert *v.* Champion,[2] a distinction is clearly taken between an adjustment on a policy, and a payment on the adjustment; and Lord ELLENBOROUGH says, that if the money has been paid, it cannot be recovered back without proof of fraud. I am therefore of opinion this money cannot be recovered back. I think on principle that money which is paid to a man who claims it as his right, with a knowledge of all the facts, cannot be recovered back. I think it on principle, and I think the weight of the authorities is so, and I think the *dicta* that go beyond it are not supported or called for by the facts of the cases. Bilbie *v.* Lumley, I think, is a decision to that effect; and for these reasons, I am of opinion, the plaintiff is not entitled to recover.

CHAMBRE, J. I concur in thinking the money is not recoverable on the payment of the private freight, whether the carriage of the treasure be considered as a legal or as an illegal transaction. If illegal, the money clearly cannot be recovered; if it be legal, the right to carry it must arise from the permission of government; and as the practice has been uniform

[1] 2 East, 469. [2] 1 Camp. 134.

for the admiral to receive his third part, we must take it that it is a part of the practice, and that the whole practice has had that assent of the government. As to the freight for the carriage of the public property, I think it stands on a different ground, and that the action is maintainable. The plaintiff had a right to it, and the defendant in conscience ought not to retain it. The rule is, that when he cannot in conscience retain it he must refund it, if there is nothing illegal in the transaction: the case is different where there is an illegality. I do not think the case of Chatfield *v.* Paxton applies much in this view of the question. I never heard of the several parts of that case till now, but I think there are sufficient authorities to say this person has paid this money in his own wrong, and that it may be recovered back. In the case of Bilbie *v.* Lumley there was a letter said to have been concealed, that ought to have been disclosed: this letter was shown to the underwriters, and they after reading it thought fit to pay the money. Now there the maxim *volenti non fit injuria* applies: in that case all argument was prevented by a question put by the court to the counsel. I am not aware of any particular danger in extending the law in cases of this sort, for they are for the furtherance of justice; neither do I see the application of the maxim used by BULLER, J., in the case of Lowry *v.* Bourdieu, and cited by the court in Bilbie *v.* Lumley, *ignorantia juris non excusat;* it applies only to cases of delinquency, where an excuse is to be made: I have searched far, to see if I could find any instance of similar application of this maxim. I have a very large collection of maxims, but can find no instance in which this has been so applied. I cannot see how it applies here. In Lowry *v.* Bourdieu, the decision turned on the transaction being illegal, and it being illegal the maxim applied, *in pari delicto potior est conditio defendentis.* Moses *v.* Macfarlan,[1] and a number of subsequent cases decide, that where the plaintiff is entitled, *ex æquo et bono*, to recover, he may recover. In Farmer *v.* Arundel, the opinion of DE GREY is not a mere *dictum*, it is part of the argument, it is a main part of the argument. He there says, where money is paid under a mistake either of fact or of law or by deceit, this action will certainly lie. It seems to me a most dangerous doctrine, that a man getting possession of money, to any extent, in consequence of another party's ignorance of the law, cannot be called on to repay it. Suppose an administrator pays money *per capita* in misapplication of the effects of the intestate, shall it be said that he cannot recover it back? It is said, that may be remedied in equity: this is an equitable action, and it would be of bad effect if it should not prevail in like cases. In the case of Bize *v.* Dickason, Lord MANSFIELD held, that if a person has paid that which in conscience he ought, but the payment of which could not be compelled, it shall not be recovered back in an action for money had and received, but that where a man has paid money under a mistake, which he was neither bound in law nor called on in conscience

[1] 1 Bl. R. 219.

to pay, he may recover it back. Now the case against the plaintiff is not so strong as it has been stated. I do not find in the case that any demand was ever made of him, or any question mooted, upon which he thought it better to submit than to litigate the point. No option ever presented itself to him, and the maxim *volenti non fit injuria* does not apply. It appears to me that the justice of the case with respect to the freight of the public treasure is entirely with the plaintiff. As to the insurance cases that have been cited, a great deal of fabricated law has been newly created within a few years, and the courts have to decide on difficult and complex cases: but those doctrines must not be carried into the general law, but confined to the occasions which give rise to them. I therefore think the plaintiff may recover as to the 20*l*.

HEATH, J. There are two questions in this case. As to the question whether a payment made under ignorance of the law without ignorance of the facts will enable a man to recover his money back again, it is very difficult to say that there is any evidence of ignorance of the law here; an officer is sent on a profitable service, the admirals are in the habit of receiving a proportion of the officer's recompense, and it is very likely the officer should acquiesce in the demand. He might not like to contest the point with his superior officer. I think a payment made with knowledge that a request would be made, is not distinguishable from the case of an actual demand. Now if money be received without expressing the use to which it is paid, it is received to the use of the payer; but when it is expressed to what use it is paid, that presumption does not arise; here the use was distinctly expressed. Moses *v.* Macfarlan has properly been questioned in many cases, and particularly by EYRE, C. J., and in Marriott *v.* Hampton,[1] in which the plaintiff sought to recover back the amount of a debt recovered by law from him, whereas he had paid it before; but it was held that the action was not maintainable. That was the case of *judicium redditum in invitum*, but this is a stronger case; for the plaintiff is a judge in his own cause, and decides against himself; and he cannot be heard to repeal his own judgment. Lord ELDON, Chancellor, in Bromley *v.* Holland,[2] approves Lord KENYON's doctrine, and calls it a sound principle that a payment voluntarily made is not to be recovered back. The plaintiff ought not to recover.

MANSFIELD, C. J. I think in this case the plaintiff ought not to recover. If it was against his conscience to retain this money, according to the doctrine of Lord KENYON, an action might be maintained to recover it back, but I do not see how the retaining this is against his conscience; for how is it claimed? Before 1801, the captains always paid freight to themselves both for private and public treasure, before they paid over the residue of the dollars. At that time it was thought proper that that practice should be discontinued so far as related to the freight of the public treasure; but

[1] 7 T. R. 269. [2] 7 Ves. 23.

in order to make captains more attentive to their charge, the Treasury and Admiralty thought it would be proper to make them an allowance, and that was to be paid to the captain by a warrant from the treasury; but so it had before been, when the captain deducted it, that was paid to the captain, and before that a practice had prevailed, one knows not how, but probably by some analogy to the practice of prize-money, that the flag officer, when only one, should be entitled to one-third; when more than one flag officer, they shared it in certain proportions. In the order which was made for letting them thenceforth be paid by a warrant, instead of deducting the freight themselves, nothing is said about any allowance to be made to admirals; the order is quite silent on the subject of what the captain shall do with the freight when he has it, but the officers of the navy all thinking that they were to proceed as they before did, go on, the one to pay, and the other to receive, as they had done before this alteration, and the admirals receive their share as before; the admiral and captain each thinking that their rights continue as before, the admiral, that he has his accustomed right; the captain, that it is his duty to pay the accustomed share, the one pays and the other receives it. This then being so, the admiral doing no more than all admirals do, is it against his conscience for him to retain it? I find nothing contrary to *æquum et bonum*, to bring it within the case of Moses *v.* Macfarlan, in his retaining it. So far from its being contrary to *æquum et bonum*, I think it would be most contrary to *æquum et bonum* if he were obliged to repay it back. For see how it is! If the sum be large, it probably alters the habits of his life; he increases his expenses, he has spent it over and over again; perhaps he cannot repay it at all, or not without great distress: is he then, five years and eleven months after, to be called on to repay it? The case of Farmer *v.* Arundel and De Grey's maxim there, is cited; it certainly is very hard upon a judge, if a rule which he generally lays down is to be taken up and carried to its full extent. This is sometimes done by counsel, who have nothing else to rely on; but great caution ought to be used by the court in extending such maxims to cases which the judge who uttered them never had in contemplation. If such is the use to be made of them, I ought to be very cautious how I lay down general maxims from this bench. In the case of Bize *v.* Dickason, the money ought conscientiously to have been repaid. There is no other case cited as an authority for the proposition. The maxim *volenti non fit injuria* applies most strongly to this case. Lowry *v.* Bourdieu was the case of a gaming policy. A bond had been given for securing the money lent, which was the only interest intended to be insured; if the plaintiff could have recovered on the policy, he might have recovered the money twice. The insurance was on goods, and he had no interest whatsoever in those goods, otherwise than that if the goods arrived the owner of them would be the better able to pay his debt. The last case is Bilbie *v.* Lumley. Certainly it was not argued, but it is a most positive

decision, and the counsel was certainly a most experienced advocate and not disposed to abandon tenable points. My Brother CHAMBRE put the case of an administrator paying away the assets in an undue course of administration. I know not that he could recover back money so paid: certainly if he could, it could be only under the principle of *æquum et bonum*. There being therefore no case which has been argued by counsel, wherein the distinction has been taken, and in which this doctrine has been held, and as we do not feel ourselves called upon to overrule so express an authority as Bilbie *v.* Lumley, I am of opinion that the defendant is entitled to retain this money. We hear nothing of what is become of the assets in this case; perhaps they may be applied among the next of kin, and dissipated; but what would be the situation of the parties, if, at the end of five years and eleven months, they could be called on to refund in such a case! I am therefore of opinion that there ought to be judgment for the defendant.

Judgment for the defendant.

LIVESEY *v.* LIVESEY.

BEFORE LORD LYNDHURST, C., OCTOBER 30, 1827.

[*Reported in* 3 *Russell*, 287.]

JAMES WORTHINGTON, by his last will, devised and bequeathed to his wife, Jane Worthington, all his estates, real and personal, "subject to the following trusts and conditions." Then the will, after giving some directions, which it is not material to mention, proceeded in the following words: "I also will and direct that my wife shall pay unto each of my daughters, Jane and Eliza, 200*l.* annually, by two equal half-yearly payments, out of the interest arising from my fortune. After my wife's death, I vest my property in trust, not already disposed of, to my brother-in-law, Mr. John Armstrong, and Mr. William Clark, for them to place out at interest on the best mortgage securities that may be had, or in the purchase of an estate or estates, with the consent of my daughters; and that my said daughters shall receive the annual interest or profits, share and share alike, which shall not be subject to the control or debts of their husbands, but to their receipts only. And my will and mind is, that my trustees shall pay to and apply for the benefit of my grandson, Edmund Worthington Livesey, the sum of 200*l.* annually, when he attains the age of twenty-one years, and before that period such part as may be judged proper out of the 200*l.* bequeathed to him, so as to give him a good education; being desirous that he may be brought up in a judicious manner, to give him a degree of respectability in society equal to his family and fortune, which have always supported honorable and useful characters in life. As to

the principal, my mind is, that my said daughters, Jane and Eliza, shall have full power to dispose of it in such proportions as they by will shall direct, to their children or grandchildren respectively, except that proportion of principal given to Eliza, and from which the interest is to arise to my grandson, viz., 4000*l.*, which sum shall be my grandson's property; but in case either of them should die without having lawful issue, then my will is, that the fortune of her so dying shall revert to and become the property of the surviving one, her children, or grandchildren, to be disposed of to them in such proportions as the one departing this life shall will and direct; and she shall also have the power of bequeathing unto her husband, provided she leaves one, 100*l.* per annum as an annuity, to be issuing from and out of the moiety so disposed of; which moiety is to be subject to the restriction, limitation, and distribution aforesaid."

The testator died in 1800, leaving his widow and his two daughters, Jane and Eliza, him surviving. The widow died in July, 1815. Edmund Worthington Livesey, who was the eldest son of Eliza, attained his full age in August, 1817, up to which time no part of the testator's estate had been applied towards his maintenance or education.

In November, 1817, a bill was filed by Jane Livesey, the daughter and personal representative of the testator, and by her husband, in order to have the rights of the parties under the will declared.

Edmund Worthington Livesey insisted by his answer, that he was entitled to the annuity of 200*l.* from the time of the testator's death, and that, on his attaining twenty-one, the testator's widow being then dead, the 4000*l.* became payable to him.

The other defendants submitted, that the annuity did not commence till Edmund Worthington Livesey attained the age of twenty-one, or, at all events, till the death of the testator's widow.

On the 19th of November, 1821, the cause was heard before the Master of the Rolls, and a decree was pronounced.

The plaintiffs, conceiving that Edmund Worthington Livesey was entitled to the annuity for the two years which elapsed between the death of the testator's widow and his attaining the age of twenty-one, had paid it to him, and had deducted 400*l.* out of that moiety of the interest which was payable to Eliza. At the hearing, however, the Master of the Rolls declared it to be his opinion, that the annuity did not commence till Edmund attained twenty-one; and, upon this, Eliza, after judgment was pronounced, but before the decree was drawn up, presented a petition, praying that a direction might be added for the payment to her of the 400*l.*, which had been thus withheld.[1]

On the 5th of July, 1822, the plaintiffs presented a petition, stating, that after Edmund attained his full age they had paid over to him the

[1] So much of the statement of facts as relates to the terms of the decree has been omitted. — Ed.

400*l.*, which had been retained out of Eliza's share of the interest, in order to satisfy the annuity for the two years which intervened between the death of the testator's widow and the termination of Edmund's minority. It prayed that a direction might be added to the decree, to enable them to retain the 400*l.* out of the growing payments of Edmund's annuity. Before the petition was heard, the decree was drawn up. But by an order, bearing date on the 29th of July, 1822, the Master of the Rolls directed, that the plaintiffs should be at liberty to deduct out of the future payments of the annuity such sums as they had paid in respect of the annuity before Edmund attained the age of twenty-one years.

From this order, and also from the decree, Edmund Worthington Livesey appealed. The petition of appeal insisted, that the court ought to have declared that he was entitled to the annuity of 200*l.*, or the sum of 200*l.* per annum, as the interest of the 4000*l.*, from the death of the testator, or at least from the death of the widow, Jane Worthington, till the payment of the 4000*l.*; and that the 4000*l.* ought to have been ordered to be paid to him, or at least that there ought to have been a declaration that he took a vested interest in that sum, and that it should be paid to him, his executors, administrators, or assigns, upon the death of his mother, Eliza Livesey.

Mr. *Shadwell*, Mr. *Preston*, and Mr. *Duckworth*, for the appellant.

Supposing that payment of the 200*l.* was not to commence, according to the true construction of the will, till Edmund was twenty-one years of age, yet the executrix cannot recover back from him the 400*l.*, which she paid to him in respect of the annuity for the two years immediately preceding his attainment of his full age: for those payments were made with perfect knowledge of the facts; and if there was any mistake, it was, at the utmost, merely a mistake in point of law. Brisbane *v.* Dacres;[1] Skyring *v.* Greenwood.[2] Even if those payments could be recovered back, they would constitute merely an ordinary debt owing by Edmund to the executrix; and on no principle can they be considered as a charge on the future growing payments of the annuity.

Sir *Charles Wetherell* and Mr. *Bickersteth* for the children of the plaintiffs.

Mr. *Horne* and Mr. *Wray* for the plaintiffs.

The Lord Chancellor. With respect to the order upon the petition,[3] it appears, that after the commencement of the suit the annuity was paid to Edmund Worthington Livesey for two years, the period which elapsed from the death of Jane Worthington to his attaining the age of twenty-one. The payment was made upon an erroneous supposition that he was entitled to it; and an equal amount was deducted from the moiety of the interest payable to Eliza Livesey under the will. After the Master of the Rolls had given judgment in the cause, but before the decree was drawn up, a petition

[1] 5 Taunt. 143. [2] 4 B. & C. 281.

[3] Only so much of the opinion is given as relates to this question. — Ed.

was presented by Eliza Livesey, praying that the sum, which had been so deducted from her moiety of the interest, might be directed to be paid to her; and this was ordered accordingly in the decree. A petition was then presented on the part of Jane Livesey the executrix, submitting that she was entitled to be repaid this sum, and praying that she might be allowed to retain it out of the future instalments of the annuity payable to Edmund Worthington Livesey. An order was made upon this petition, after the decree was passed.

It was contended that this was irregular, and that the court had no jurisdiction to make the order. There can be no doubt that this money ought to be repaid: and the only question, therefore, is, Whether the Master of the Rolls was justified, in point of form, in making the order in question? This order, made upon the petition of Jane Livesey, does not vary the decree. The decree merely declares the rights of the parties under the will, with the exception of the direction as to the payment to Eliza Livesey. The order does not make any alteration in these particulars. It is an order consequent upon that declaration. There is no dispute as to the facts. Edmund Worthington Livesey had been paid a sum of money on account of the bequest made to him by James Worthington. The bequest was supposed to be more extensive than it has since proved. The construction of the will was misapprehended. The order then merely directs that such sum, so paid, shall be considered in account with the executrix, and taken as a part-payment of the bequest as now ascertained. Such is the effect of the order. I think, therefore, that it not only is in substance just, as between those parties, but that it is not incorrect in point of form.

The appeal must consequently be dismissed.[1]

M'CARTHY *v.* DECAIX.

In Chancery, before Lord Brougham, C., May 9, 1831.

[*Reported in* 2 *Russell and Mylne*, 614.]

This was a suit instituted by the personal representative of Robert Tuite, deceased, against the personal representative of his wife, also deceased, for the purpose of recovering the arrears of an annuity, to which, upon the death of the wife, and in default of her appointment, Mr. Tuite, as administrator of his wife, had become entitled, by virtue of a settlement executed on their marriage. Mrs. Tuite died in the month of February, 1807; her husband took out administration to her estate and effects; and in the month of December, 1811, he died.

The defence set up was, that Mr. Tuite, soon after the death of his wife,

[1] *Conf.* Hilliard *v.* Fulford, 4 Ch. D. 389. — Ed.

had agreed to give up, and had actually renounced all claims that might accrue to him under the settlement or in his marital character, for the benefit of the family of his wife, from whom the settled property had been derived.

At the hearing of the cause, two questions were principally argued: first, whether the dealings and correspondence between Mr. Tuite and his wife's relations, in the years 1807 and 1808, were of such a nature as to amount to an absolute renunciation of all his interest in their favor; and, secondly, if they were, whether that renunciation was made at a time when Mr. Tuite was fully apprised of the extent of his legal rights, as the surviving husband and the administrator of his wife, and of the amount and value of her property.

At the hearing of the cause on the 12th of December, 1821, before Sir JOHN LEACH, then Vice-Chancellor, his Honor referred it to the Master to inquire and state to the court, whether Robert Tuite died in the intention of renouncing all interest in his wife's property in favor of her family, and whether before his death he was apprised of the circumstances which belonged to that property, and of the amount of the claim made in respect of the annuity.

The plaintiff appealed against that decree. The petition of appeal was originally argued before Lord ELDON; but his Lordship having resigned the Great Seal before disposing of the case, it now came on to be reheard.

Sir *E. Sugden* and Mr. *R. P. Roupell* for the plaintiff.

Mr. *Treslove* and Mr. *Stuart*, for the defendant.

The LORD CHANCELLOR. This was a case of considerable difficulty, long pending in this court, and much considered by Lord ELDON, who went out of office before he finally decided it on the appeal. The observations and notes of that learned judge upon the case, with which notes I have been furnished, show the great attention he gave to it, and the difficulty under which he labored with respect to the facts; and in consequence of those difficulties, it has received the greatest attention from me, and I have delayed pronouncing an opinion until I could look fully into the matter.

The case was this: — A person of the name of Tuite contracted a marriage in this country with an Englishwoman, — the marriage being solemnized in England, but he being himself a Dane by birth, fortune, and domicile. He afterwards removed his wife from this country, the *locus contractus* (with which he appears to have had no further connection), to the dominions of the King of Denmark, where his subsequent domicile continued to be; and in that kingdom the marriage was dissolved by a valid Danish divorce, as far as such a divorce could dissolve it; but which, I may observe in passing, by the law of this land could have no operation, as was fully established by the opinion of the twelve judges, who solemnly decided, after argument, that no proceedings in a foreign court could operate to dissolve or affect a marriage celebrated in England.

During the lifetime of Mrs. Tuite, and subsequently to the divorce, certain arrears of an annuity which she enjoyed under the marriage settlement accrued, or were said to have accrued, amounting at her death to the sum of £7000. Prior to that event, a litigation in this court had been commenced, to which the claim to these arrears was incident. After the decease of both husband and wife, the result of the suit was to put the party representing her in possession of those arrears, and two sums were actually recovered and paid to them, amounting in the whole to £3631; and the whole of the question in this cause arises with respect to those sums, it being a conflict between the respective personal representatives of Mr. and Mrs. Tuite, upon the effect of a correspondence between Mr. Tuite and Mrs. Delattre, the sister of Mrs. Tuite, and her legal adviser Mr. Pinegar.

Upon that correspondence the whole question in dispute appears to turn. On the death of Mrs. Tuite, letters are written by Mrs. Delattre representing her to have died in very poor circumstances; so much so that her debts were said to amount to more than all the little property she left could satisfy, even including her wearing apparel. Mr. Tuite, in reply, writes two letters to Mrs. Delattre, and in answer to her application to that effect; he at first refuses to execute a power of attorney to receive any funds that may become due, denying his right, because he insists it was a good divorce (nor indeed had it been decided till Lolley's case in 1812–13, that a foreign divorce was of no effect as regards an English marriage); and he afterwards says, "If such a power is required, I would not have anything; her family is most heartily welcome;" and his language in another letter is, "I claim nothing. I would accept of nothing; nevertheless, in case it may by the form of your law be requisite, I give Messrs. S. and L. a power to act for me." How entirely he relied upon the marriage as being in other respects at an end, is manifest from the fact, that besides giving up the claim to the property of the deceased lady, he calls her by the name of Mrs. Trefusis, which was the name she bore before she became his wife.

It must, therefore, at least be admitted that in giving this, which is called his renunciation, the husband labored under two capital errors, one of law, the other of fact; the one not superinduced by any suppression of circumstances on the part of Mrs. Delattre and her agent; whereas the other may be said to have arisen from their not disclosing facts, which there is every reason to believe they must have known, — the latter an error which if they did not create, they had at least, to a certain degree, a share in maintaining.[1]

This then is a very important error, which may have influenced Mr. Tuite in making this renunciation. And can I hold a party to be bound by an act or declaration made in ignorance of so material a fact? Was it not a most material ingredient in forming his judgment and influencing his inclination?

[1] A portion of the opinion discussing Lolley's case has been omitted. — Ed.

He might very well say, "I am no longer her husband; I give up all claim to her property," when he supposed the connection of husband no longer to subsist. And yet if he had been told that he was still her husband; that no power could dissolve the marriage; that he was liable, in his person and property, for her debts; that the tribunals of his own country would acknowledge this to be the law; that as he undertook the relation *cum onere*, so also he was beneficially entitled to whatever was the property of his wife, be it small or great, — it is impossible to say that this knowledge might not have altered his intention; for if a man does an act under ignorance, the removal of which might have made him come to a different determination, there is an end of the matter. What he has done was done in ignorance of law, possibly of fact; but in a case of this kind that would be one and the same thing.

These considerations do not appear to have been sufficiently adverted to in the court below. I cannot help thinking, besides, that taking the case at the lowest, Mr. Tuite and Mrs. Delattre were, at the time of the supposed renunciation, in a state of ignorance as to some other most material facts; and it is impossible to say, that a person shall be held to what he has done under circumstances which have been so erroneously represented to him, however innocently the representation may have been made. Who can venture to predict what might have been Mr. Tuite's course had he known how the facts really stood? If a man, separated and living at a distance from his wife, receives a letter telling him that she is on her deathbed, and that she leaves no assets, — not enough to pay the costs of her funeral; and he writes in reply, "I shall not interfere; she is no wife of mine;" it is impossible to say that he shall be bound by that disclaimer, made under the influence of a common error.

Doubtless, if with a full knowledge that the wife's property might be large or might be small, he distinctly gave up all title to it, whatever might turn out to be its value, his disclaimer would be good. But if he entertained a *bona fide* belief that she died insolvent, it would be going far to say that his renunciation should bind him, or that the other party should have a right to hold him to it. In Cocking *v.* Pratt [1], where Sir JOHN STRANGE had to deal with the case of a mother contracting with her daughter as to her share of the father's personal estate, he held the transaction to be void, on the ground that the mother plainly had better information than the daughter. But even if it be assumed that Mrs. Delattre knew no more of the real facts than Mr. Tuite, Willan *v.* Willan [2] is an authority to show that where both parties were in a state of equal ignorance as to the facts respecting which they were dealing, the transaction will not be supported.

It is unnecessary for me, however, to decide as to the law on this point, because when the evidence is narrowly scrutinized, the circumstances of the transaction relieve the case from all difficulty, showing that there is

[1] 1 Ves. 400. [2] 16 Ves. 72.

every reason to believe that the wife's relations, living in England, must have known, and did, in point of fact, know a great deal more than Mr. Tuite, the foreigner, living in Santa Cruz; and bringing the case, therefore, directly within the principle laid down by Sir JOHN STRANGE in Cocking *v.* Pratt.

[The LORD CHANCELLOR then entered into a detailed examination of the language and effect of the correspondence between the parties, and expressed his opinion that the conduct and letters of Mrs. Delattre and her agent clearly indicated that they were better informed as to the state of Mrs. Tuite's property than her husband, and were well aware it was not of that insolvent description which had been represented. His Lordship then continued: —]

On the whole, it is sufficiently established that when Mr. Tuite agreed to give up any claim to his wife's fortune, he was acting under a misapprehension in two most material particulars: in the first place, he believed that Mrs. Tuite at the time of her death had by law ceased to be his wife, an impression which seems to have been the mainspring of his liberality; and, secondly, he was wholly ignorant, or rather he was positively misinformed, with respect to the amount and value of her property, and his ignorance certainly was not shared, at least in an equal degree, by the parties with whom he was dealing.

Upon these two grounds I am clearly of opinion that the agreement cannot be supported as a valid renunciation by Mr. Tuite, and that the judgment of the court below must be reversed.

DIBBS *v.* GOREN.

IN CHANCERY, BEFORE LORD LANGDALE, M. R., JANUARY 29, 1849.

[*Reported in* 11 *Beavan*, 483.]

IN 1815, the testator made his will, giving his property to trustees on certain trusts for his children and grandchildren. He died in 1816, and the trustees, acting on their own notion of the effect of the trusts, proceeded in their performance. In 1836, a bill was filed for the administration, and it was then found that the trustees had acted under an erroneous view of the effect of the will; and it was so declared by the decree made in January, 1841.

It turned out, that two of the testator's children, Henrietta and John, had each received from the trustees a sum of £111, part of the trust property, to which they were not entitled, and that two other children, Charles and Robert, had also received £782, to which they were not, under the will, entitled.

These children were entitled to other interests under the will.

In 1828, John had assigned his interest under the will to Macdougal for valuable consideration.

Mr. *Turner* and Mr. *Chandless*, for the trustees.

Mr. *Shadwell*, Mr. *Kindersley*, Mr. *Goren*, Mr. *Roupell*, Mr. *Bevir*, Mr. *Wright*, and Mr. *Giffard*, for other parties.

Mr. *Sheffield*, for Macdougal, the assignee of John.

The MASTER OF THE ROLLS. The trustees seem to have thought it better to construe this will themselves than to incur the expense of coming to the court for its assistance.

Where a trustee takes on himself to act upon his own authority, and pays to the parties beneficially interested sums to which they are not entitled, it becomes necessary for this court to enforce the execution of the trust, by recovering back the sum thus received contrary to the trusts. The difficulty has arisen from the trustees acting without the assistance of the court, and running the risk of error. Unfortunately they have made these payments, and, by their act, some of the parties have received a portion of the estate to which they are not entitled. I cannot allow them to retain it.

The plaintiff is entitled to have these sums deducted from the shares of John and his assignee, and of Henrietta and Charles, with a declaration, that, until those sums have been recouped, they form a lien on the other monies which may become due to them under the will.

EDWARD H. COOPER, APPELLANT *v.* WILLIAM PHIBBS, CHARLOTTE S. COOPER, AND OTHERS, RESPONDENTS.

IN THE HOUSE OF LORDS, MAY 31, 1867.

[*Reported in Law Reports, 2 English & Irish Appeals*, 149.]

THIS was an appeal against a decretal order of the Lord Chancellor of Ireland, dated 14th of June, 1865, and made under the following circumstances.—

By deed of the 12th of May, 1806, Sir Edward Crofton, for the considerations therein mentioned, conveyed the lands of Ballysadare in the county of Sligo, with tolls and customs of markets, etc., and the salmon fishery, and all other the fisheries of the river of Ballysadare, situate in the same county, to Joshua Edward Cooper in fee.

Shortly after this conveyance had been executed, Joshua Edward Cooper (who was unmarried) was declared a lunatic, and Edward Synge Cooper, his only brother, and his presumptive heir, was appointed committee of his

estates. His estate in the county of Sligo was called the Markree estate. Edward Synge Cooper had two sons, Edward Joshua Cooper and Richard Wordsworth Cooper; Edward Joshua had been once married, but had no child by that marriage. On the 13th of February, 1827, a deed of settlement was executed on his intended marriage with Miss Wynne, and to that settlement his father, Edward Synge Cooper, and his brother, Richard Wordsworth Cooper, became parties. Under that settlement Edward Synge Cooper covenanted that if the lunatic should die intestate and without issue, and should be at the time of his death seised in fee "of or in the said several towns, lands, tenements, or hereditaments in the county of Sligo," etc., "thereinbefore and thereinafter particularly enumerated and described;" or if at any time after the decease of the lunatic, he, Edward Synge Cooper, should happen to be seised of any freehold estate "in the said several last-mentioned lands, tenements, and hereditaments, by any title derived by, through, or under" the lunatic, he, Edward Synge Cooper, would, within six months after the lunatic's death, convey to trustees "all that and those the town and lands of Ballysadare, and all the tenements, houses, and plots therein, together with the tolls and customs of the fairs and markets therein, . . . and all other estates of inheritance whereof the said [lunatic] shall die seised or possessed, or such, and so many, and all such parts of the same as shall have descended, remained, or vested in the said Edward Synge Cooper as tenant in fee simple or fee tail in possession thereof, in any of the manners or ways aforesaid, together with their several sub-denominations and appurtenances, and also all houses, wastes, common, common of pasture, waters, watercourses, easement, liberties, privileges, profits, appurtenances," etc., to himself for life, remainder to his son Edward Joshua for life, remainder to his issue male in strict settlement, remainder to his other son, Richard Wordsworth Cooper, for life, remainder to his issue male in strict settlement. The word "fishery" did not occur in the settlement. There was a similar covenant on the part of Edward Joshua Cooper and of Richard Wordsworth Cooper that if the said estate should descend to or vest in them, or either of them, from the lunatic, they or either of them would convey the same to the uses specified in the covenant of their father, Edward Synge Cooper. In August, 1830, Edward Synge Cooper died, leaving his elder brother, the lunatic, and his own two sons, Edward Joshua and Richard Wordsworth, him surviving. Edward Joshua from that time acted as committee of the lunatic. In the early part of 1837 a petition for a bill had been presented to Parliament, by Edward Joshua as committee, to give the lunatic powers to improve the fishery; but while it was passing through Parliament the lunatic died, and then in the various clauses the necessary changes were made by introducing the name of Edward Joshua, who had succeeded to the property. The Act, which was known as the 1 Vict. c. lxxxix., recited that the "rivers Arrow and Owenmore rise from two large lakes in different parts of the

county of Sligo, and, after flowing through a large tract of country, unite their streams at about a mile above the town of Ballysadare, whence they flow into the same channel to the bay of Ballysadare, where, by one mouth they discharge their waters into the bay," and then it described how the flow of their waters was interrupted by ledges of rocks, which prevented salmon getting up the river; and it recited the conveyance by Sir Edward Crofton to the lunatic, "and his heirs, and assigns for ever," of the whole eastern bank of the river, "together with the salmon fishery, and all other the fisheries of the river," possessed by Sir Edward Crofton; that the lunatic after the conveyance, and up to the time of his death, "did uninterruptedly exercise and enjoy the exclusive right of taking the salmon which so as aforesaid annually congregate within the mouth of the said united rivers;" that the lunatic died in June, 1837, "whereby all the aforesaid estates, towns, lands, and fishery, have descended to and are now vested in the said Edward Joshua Cooper, who is the nephew and heir-at-law of" the lunatic; that "the said Edward Joshua Cooper is desirous of constructing canals or water cuts at his own expense" in consideration of the exclusive right of fishery being vested in him, his heirs, and assigns, — and it was therefore enacted that the powers to make the cuts and canals, etc., should be granted to him, provided that the cuts "shall be altogether situated on the estate and property of the said Edward Joshua Cooper," etc. There were various other provisions, in all of which Edward Joshua Cooper was spoken of as the owner of the estate, and the title of the Act, as altered after the death of the lunatic, was, "An Act to enable Edward Joshua Cooper, Esq., to establish and protect a Salmon Fishery upon the Lakes and Rivers of Owenmore and Arrow, and also within the Bay of Ballysadare, in the County of Sligo."

Edward Joshua Cooper constructed the canals and cuts, and improved the salmon fishery, as provided for by this Act, and he continued in possession thereof, and of the estates to which he had succeeded, until his death.

By his second marriage he had five daughters but no son.

Richard Wordsworth Cooper had also married, and he died in 1850, leaving the appellant his eldest son and heir-at-law.

In 1858 the appellant married, and on the 8th of August, 1858, a disentailing deed, and then a settlement, of the Sligo estates, were executed by Edward Joshua Cooper, the estates being settled as subject to the uses of the settlement of 1827.

During the life of Edward Joshua Cooper, he, apparently believing that the Act 1 Vict. c. lxxxix., vested the fee simple of the fishery in him, discharged from the limitations of the settlement of 1827, always spoke of himself as the absolute owner of the fishery, and, as alleged in the cause petition of the appellant, always assumed such to be the fact.

In September, 1858, the appellant joined with Edward Joshua Cooper in a lease, renewable for ever, of two and a half acres of land adjoining the

fishery, which lease was granted to a Mr. Leech, as trustee for Edward Joshua Cooper, who afterwards built on this land a messuage known as the Rapids Cottage, with a coach-house, and other premises.

In April, 1863, Edward Joshua Cooper died intestate, leaving his five daughters (but no male issue) him surviving. On his death the appellant entered into possession of the estates, and on the 14th of October, 1863, there was executed between him and Phibbs, who, under the settlement upon Edward Joshua's second marriage, acted as trustee for the daughters, an agreement for a lease, which the appellant now sought to cancel. It was in the following terms: "W. Phibbs agrees to let, and Colonel Edward Cooper agrees to take, for a term of three years, to be computed from the 1st day of November next, the salmon fishery at Ballysadare, county Sligo, together with the Rapids Cottage, coach-house, and gate-house, at the yearly rent of £550 sterling, said rent to be payable half yearly, on every 1st day of May and 1st day of November in each year. The said Edward Cooper shall, during the tenancy, keep proper books, showing the receipts and expenditure of said fishery, and weights in pounds of number of fish taken," and shall allow Phibbs to inspect the books, and to have free access to the fishery.

Before the first half year's payment became due, the appellant purchased and read the Act of Parliament, 1 Vict. c. lxxxix., and then, believing that it had not the effect which had always been attributed to it, he filed his cause petition, in the Court of Chancery in Ireland, to have the agreement set aside. To this cause petition Mr. Phibbs, and the five daughters of Edward Joshua Cooper, were made defendants, and the prayer was, that the agreement of the 14th of October, 1863, might be delivered up to be cancelled, and the defendant, Mr. Phibbs, perpetually restrained from suing upon the same, the petitioner submitting to any terms which the court might impose as the condition for granting the said relief, and (after naming the defendants) asking for such farther relief as "the nature of the case would admit of, and as to the court might seem fit."

Affidavits in answer were put in, and witnesses examined, and the cause was heard before the Lord Chancellor of Ireland, who, on the 14th of June, 1865, made a decretal order dismissing the petition with costs, but without prejudice to any question as to the ultimate right to the fishery.[1]

[1] 17 Ir. Ch. Rep. 73. In the course of his judgment the Lord Chancellor said: "The object of this cause petition is to relieve Edward Henry Cooper from the consequences of an act done by him while in ignorance of his true position with respect to this fishery, done by him in derogation of his rights while acting under the influence of a mistake. . . . No doubt, a mistake in point of law may be corrected both in this court and in a court of law. This is now perhaps sufficiently established, though it was for some time a subject of controversy in courts of law;" but his Lordship remarked that this power of correction would not be exercised except where equity and good conscience required it, and his Lordship finally came to the conclusion, that no valid ground for relief was established in this case.

The Attorney-General (Sir *John Rolt*), and Mr. *G. M. Giffard*, Q. C. (Mr. *Fetherston H.* was with them), for the appellant.

Mr. *Lawson*, Q. C. (of the Irish Bar), and Sir *Roundell Palmer*, Q. C., for the respondents.

May 31. Lord Cranworth : — My Lords, this is an appeal against a decree of the Lord Chancellor of Ireland, of the 14th of June, 1865, dismissing a cause petition which had been filed by the appellant on the 9th of April, 1864, pursuant to the Chancery Regulation Act of 1850. The object of the petition was to be relieved from an agreement, dated on the 14th of October, 1863, by which the petitioner agreed to become tenant to the respondent Phibbs, for three years, of the salmon fishery of Ballysadare, in the county of Sligo. The ground of the relief asked was, that the petitioner had entered into an agreement in mistake as to his rights. He thought that the fishery belonged to the other respondents, for whom Phibbs acted as trustee; but he was in truth himself the owner of the fishery as tenant thereof in tail.[1]

The consequence was, that the present appellant, when, after the death of his uncle, he entered into the agreement to take a lease of this property, entered into an agreement to take a lease of what was, in truth, his own property, — for, in truth, this fishery was bound by the covenant, and belonged to him, just as much as did the lands of Ballysadare ; therefore, he says, I entered into the agreement under a common mistake, and I am entitled to be relieved from the consequence of it.

In support of that proposition he relied upon a case which was decided in the time of Lord Hardwicke, not by Lord Hardwicke himself, but by the then Master of the Rolls, Bingham *v.* Bingham,[2] where that relief was expressly administered. I believe that the doctrine there acted upon was perfectly correct doctrine ; but even if it had not been, that will not at all shew that this appellant is not entitled to this relief, because in this case the appellant was led into the mistake by the misinformation given to him by his uncle, who is now represented by the respondents.[3] It is stated by

[1] So much of the opinion as relates to the question of title has been omitted. — Ed.

[2] 1 Ves. 127.

[3] Snell *v.* Insurance Co., 98 U. S. 85 ; Jordan *v.* Stevens, 51 Me. 78 ; Martin *v.* R. R. Co., 36 N. J. Eq. 109, accord.

If the mistake of law, or as to his private right, be that of one party only to a transaction, it may be either that the mistake was induced or encouraged by the misrepresentation of the other party, or that, though not so induced or encouraged, it was known to and perceived by him, and was taken advantage of, or it may be that he was not aware of the mistake. Whatever may be the circumstances of the case, a court of equity may, under the peculiar circumstances of the case, grant relief. But if it appear that the mistake was induced or encouraged by the misrepresentation of the other party to the transaction, or was perceived by him and taken advantage of, the court will be more disposed to grant relief than in cases where it does not appear that he was aware of the mistake. *Kerr on Fraud and Mistake*, 2 Ed. 470. — Ed.

him in his cause petition, which is verified, and to which there is no contradiction, and in all probability it seems to be the truth, that his uncle told him, not intending to misrepresent anything, but being in fact in error, that he was entitled to this fishery as his own fee simple property; and the appellant, his nephew, after his death acting on the belief of the truth of what his uncle had so told him, entered into the agreement in question. It appears to me, therefore, that it is impossible to say that he is not entitled to the relief which he asks, namely, to have the agreement delivered up and the rent repaid. That being so, he would be entitled to relief, but he is only entitled to this relief on certain terms, to which I will presently advert.

Before I do so I must refer to an argument which was relied on very much by the respondents, namely, that the fishery conveyed in 1806 by Sir Edward Crofton was not the fishery in the estuary, but only in the rivers, and that consequently the nephew, Edward Joshua, had no right whatever in that fishery under the descent from his uncle. I cannot think that there is any foundation for this suggestion, because the Act of Parliament expressly states that the fishery in the estuary and at the mouths of the rivers, had descended from the lunatic uncle upon Edward Joshua. But even if it had been so, in my opinion it would not have made the least difference, for the right of fishing in rivers traversing the lands is an incident to the right of property, and that property certainly was governed by the covenant of 1827.

The argument on the part of the respondents is, that the right to make the new cuts conferred by the Act was a new right, and that that new right was granted to Edward Joshua in fee. I do not think that that is a true construction of the Act, but if it was it would be a right which Edward Joshua obtained by virtue of his right to the lands and to the fishing in the fresh waters. As to that right he stood in a fiduciary relation to those interested under the deed of 1827. But for his right under that instrument he could not have obtained the powers conferred by the Act. In my opinion the very same doctrine that is acted upon so continually, that a tenant for life of a renewable property, if he renews it, cannot by possibility renew it for his own benefit, applies in principle to this case. If the facts had been such as the respondents contend they were, namely, that he was the owner in fee simple under the Act of Parliament, and that the property was not governed by the covenants of 1827, still, even if it was not governed by those covenants, he stood in a fiduciary character, which disqualified him from making any such contention as that. Therefore, *quâcunque via*, it is clear to my mind that the appellant is entitled to the relief he asks by getting rid of this agreement.

Then the next question is, what are the terms upon which this relief is to be given? Now, the respondents allege that their father, Edward Joshua, in making the canals and other works necessary for establishing

the fishery, and also in purchasing up fishery rights in the bay, expended very large sums of money. First of all, he was at the expense of obtaining the Act of Parliament. It was intended that the Act of Parliament should be passed in the lunatic's lifetime, but the lunatic having died, it was treated as being from the beginning Edward Joshua's expenditure. He was at great expense in purchasing up the rights of fishery of different proprietors on the banks, and he was at very large expense in making cuts and removing obstructions, so as to make the fishery available. That, at least, is the allegation of the respondents. Now, if that is so, the question is, upon what terms ought this relief to be granted? It is impossible to decide the merits of this claim in the absence of the persons entitled to the *corpus* of the estate. On the marriage of the appellant, in 1858, the property was settled to uses, and on trusts, for the benefit of the appellant and his wife, and the issue of the marriage. The appellant, therefore, has not brought before the court all the persons interested in this question. If the respondents succeed in establishing their lien, it will be a lien affecting the life interest of the appellant, as well as the rest of the *corpus* of the property, and so justice would not be done to them if we were to give relief to the appellant by simply setting aside the agreement on which they claim a lien. They have a right to have that question disposed of. I submit to your Lordships, therefore, that all that we can do is to remit the case to the Court of Chancery in Ireland, with declarations which shall enable the parties to have this question properly decided.

The declarations that I would suggest to your Lordships as the proper ones to be made, are these: To declare that the lands and hereditaments conveyed to Joshua Edward Cooper by the deeds of 1806 (including the fishery of Ballysadare), were comprised in the settlement of the 13th of February, 1827, and were bound by the covenant of Edward Joshua Cooper therein contained; and that at the time of the passing of the Act of Parliament of 1 Vict. c. 89, the said Edward Joshua Cooper was a trustee of the lands, hereditaments, and fishery of Ballysadare, for the persons entitled under the trusts of the aforesaid settlement of 1827, and that the rights, powers, and interests granted to the said Edward Joshua Cooper, his heirs and assigns, by the said Act of Parliament, must be deemed to have been taken by him as a trustee for the persons entitled under the settlement of 1827, including himself as tenant for life; and that all the estates, rights, and interests acquired by the said Edward Joshua Cooper, under and by virtue of such powers, and the canal and works made and constructed by him, by virtue of the said Act, were acquired, made, and held by him in like manner, in trust for himself and the other persons entitled under the said settlement of 1827. And farther declare: that the lands and fishery of Ballysadare were also comprised in the settlement of the 6th of August, 1858; and that under and by virtue of the said several settlements, the appellant was, at the time of the making of the agreement

of the 14th day of October, in 1863, in his petition mentioned, entitled as tenant for life to the said lands and fishery of Ballysadare, including therein the rights and interests and works acquired and made by the said Edward Joshua Cooper, as aforesaid (save and except only the piece of land demised by the deed of the 27th of September, 1858, and the buildings thereon). That alludes to a lease that was granted by the appellant, the details of which it is immaterial to allude to, for this question. And farther declare: that the aforesaid agreement of the 14th of October, 1863, in the said petition mentioned, was made and entered into by the parties to the same under mistake, and in ignorance of the actually existing rights and interests of such parties in the said fishery. And farther declare; that the said agreement is not in equity binding upon the appellant and respondents, but ought to be set aside, subject to the appellant paying to the respondents a proper occupation rent for the said excepted piece of land and cottage, to be ascertained by the Master in the usual manner: and subject also, as hereinafter is mentioned, that is to say, the respondents claiming to have a lien on the said fishery on account of the moneys said to have been expended by the said Edward Joshua Cooper in obtaining the said Act of Parliament, and in purchasing the said rights of fishery, and in making and improving the same. Let the said petition stand over for six months, with liberty for the appellant to bring before the court, by supplemental petition, all persons interested with respect to the said claim, and refer it back to the court to do as may be just on such supplemental petition, having regard to the aforesaid declaration; and if the appellant shall fail to file such supplemental petition within the period aforesaid, or such farther period as may be allowed by the court, then let the present appeal be dismissed with costs.

Upon these grounds, I move your Lordships that the decree below should be reversed, subject to those declarations.

Lord WESTBURY. The result,[1] therefore, is, that at the time of the agreement for the lease which it is the object of this petition to set aside, the parties dealt with one another under a mutual mistake as to their respective rights. The petitioner did not suppose that he was, what in truth he was, tenant for life of the fishery. The other parties acted upon the impression given to them by their father, that he (their father) was the owner of the fishery, and that the fishery had descended to them. In such a state of things there can be no doubt of the rule of a court of equity with regard to the dealing with that agreement. It is said *ignorantia juris haud excusat;* but in that maxim the word *jus* is used in the sense of denoting general law, the ordinary law of the country. But when the word *jus* is used in the sense of denoting a private right, that maxim has no application.[2] Private

[1] So much of the opinion as relates to the question of title has been omitted. — ED.

[2] With regard to the objection, that the mistake (if any) was one of law, and that the rule *ignorantia juris neminem excusat* applies, I would observe upon the peculiarity of

right of ownership is a matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is, that that agreement is liable to be set aside as having proceeded upon a common mistake. Now, that was the case with these parties — the respondents believed themselves to be entitled to the property, the petitioner believed that he was a stranger to it, the mistake is discovered, and the agreement cannot stand.

this case, that the ignorance imputable to the party was of a matter of law arising upon the doubtful construction of a grant. This is very different from the ignorance of a well-known rule of law. And there are many cases to be found in which equity, upon a mere mistake of the law, without the admixture of other circumstances, has given relief to a party who has dealt with his property under the influence of such mistake. Therefore, although when a certain construction has been put by a court of law upon a deed, it must be taken that the legal construction was clear, yet the ignorance, before the decision, of what was the true construction, cannot, in my opinion, be pressed to the extent of depriving a person of relief on the ground that he was bound himself to have known beforehand how the grant must be construed. Lord CHELMSFORD in Earl Beauchamp *v.* Winn, L. R. 6 H. L. 223, 234.

A misrepresentation of law is this: when you state the facts, and state a conclusion of law, so as to distinguish between facts and law. The man who knows the facts is taken to know the law; but when you state that as a fact which no doubt involves, as most facts do, a conclusion of law, that is still a statement of fact and not a statement of law. Suppose a man is asked by a tradesman whether he can give credit to a lady, and the answer is, "You may, she is a single woman of large fortune." It turns out that the man who gave that answer knew that the lady had gone through the ceremony of marriage with a man who was believed to be a married man, and that she had been advised that that marriage ceremony was null and void, though it had not been declared so by any court, and it afterwards turned out they were all mistaken, that the first marriage of the man was void, so that the lady was married. He does not tell the tradesman all these facts, but states that she is single. That is a statement of fact. If he had told him the whole story, and all the facts, and said, "Now, you see, the lady is single," that would have been a misrepresentation of law. But the single fact he states, that the lady is unmarried, is a statement of fact, neither more nor less; and it is not the less a statement of fact, that in order to arrive at it you must know more or less of the law.

There is not a single fact connected with personal *status* that does not, more or less, involve a question of law. If you state that a man is the eldest son of a marriage, you state a question of law, because you must know that there has been a valid marriage, and that that man was the first-born son after the marriage, or, in some countries, before. Therefore, to state it is not a representation of fact seems to arise from a confusion of ideas.

It is not the less a fact because that fact involves some knowledge or relation of law. There is hardly any fact which does not involve it. If you state that a man is in possession of an estate of £10,000 a year, the notion of possession is a legal notion, and involves knowledge of law; nor can any other fact in connection with property be stated which does not involve such knowledge of law. To state that a man is entitled to £10,000 consols involves all sorts of law. Therefore this is a statement of fact, and nothing more; and I hold the argument to be wholly unfounded which maintained that it was a statement of law. Sir GEORGE JESSEL, M. R., in Eaglesfield *v.* Marquis of Londonderry, 4 Ch. D. 693, 702. — ED.

But then, when the appellant comes here to set aside the agreement, an obligation lies upon him so to constitute his suit as to enable a court of equity to deal with the whole of the subject-matter, and once for all to dispose of the rights and interests of the parties in the settlement. Now although the agreement was inoperative for the purpose of giving to the petitioner a valid lease of the property, yet it might operate to this extent, that so far as the respondents had in equity a lien upon the property, their estates and interests in respect of that lien might be affected by the agreement. And there is another particular also which must be noticed, which for the moment, I think, in the preparation of these minutes, has escaped our attention, namely, that unquestionably the respondents were entitled to the cottage and to the piece of land, upon which no rent has been paid. But, during the time that has elapsed, I understand the fact to be, that the petitioner has had the possession and enjoyment of that cottage and of that piece of land. In respect of those particulars, therefore, a proper occupation rent ought to be paid by him.

What, then, are the rights and interests of the parties which ought to be ascertained? They are, as I have already observed, the sum of money due to the respondents, and charged upon the property, as being the expenditure of their father, the benefit of which the petitioner, as tenant for life, has enjoyed. Now, no doubt that expenditure constitutes a lien, — a charge in the nature of a mortgage charge upon the property. It must be ascertained, and an obligation lies upon the present appellant to give the court the means of ascertaining it. That is the reason, therefore, why the decree is proposed to be put in the form which your Lordships have heard, namely, that although a declaration is made, in order to show the basis upon which the opinion of the House is founded, with respect to the invalidity of the agreement, yet the House stops short of giving positive relief, except on the terms imposed on the petitioner, to which in reality, by the prayer of his petition, he submits, by giving an opportunity to the respondents to ascertain the full measure of their rights and interests, in order that complete justice may be done, by declaring that they will be entitled to a charge for the principal money so ascertained, and to interest thereon, at the rate of 4 per cent, from the time of the death of their father, Edward Joshua Cooper, who was the last person in possession of the fishery antecedent to the title of the present appellant, and declaring also (which must be added to that), that they are entitled to an occupation rent during the time that the present appellant has been in possession and enjoyment of the cottage and the piece of land.

My Lords, these terms, I have very little doubt, will be submitted to by the petitioner, because they are consistent with the willingness, which he has expressed in his petition, to have the whole of the rights ascertained. And if that be done, and if he brings before the court, by supplemental cause petition, the parties who are interested in the ascertainment of those

rights, the subject will be disposed of; but, if he does not do so, then he has brought forward an insufficient and incompetent petition, upon which full equity and full relief cannot be given, and the only result must be, that his petition to the court below ought to be dismissed, though it must be dismissed upon quite different grounds.

My Lords, I regret to find that observations have been made in the court below, though I cannot at all suppose that they were the *ratio decidendi*, that upon some extrinsic evidence it appeared to the court below that the fishery was not intended to be comprised in the deed of 1827. When there is an application to correct an instrument, or to set aside an instrument, the intention of the parties is to be collected from the words they have used; and no words can be more pertinent or more comprehensive than the words in the settlement of 1827, and the words in the settlement of 1858, to denote the intention of including the fishery in the provisions of those deeds, and making it subject to the trusts which are thereby created.

Lord COLONSAY concurred.

Ex parte JAMES. *In re* CONDON.

IN CHANCERY, JULY 10, 1874.

[*Reported in Law Reports* 9 *Chancery Appeals*, 609.]

THIS was an appeal from a decision of Mr. Registrar ROCHE, sitting as Chief Judge in Bankruptcy.

In the month of October, 1873, H. Bradshaw commenced an action in the Court of Queen's Bench against John Condon, in which he obtained judgment for his debt and costs, amounting to £274 3*s.* 5*d.*

On the 15th of November, 1873, Bradshaw sued out a writ of *fieri facias* against Condon, and on the 17th of November the sheriff of Middlesex took possession under it of certain goods of the defendant's at Millwall.

On the 18th of November, Condon filed a petition for liquidation by arrangement, notice of which was served on the sheriff on the 22nd of November.

On the same day the sheriff sold the goods, which produced a net sum of £142 15*s.* 6*d.*

On the 5th of December the first general meeting of creditors was held, but no resolution was passed except that the meeting should be adjourned till the 16th of December.

On the 16th of December neither the debtor nor his solicitor was present at the adjourned meeting, and no resolution was passed by the creditors. No further proceedings were taken in the liquidation.

On the 17th of December the sheriff paid Bradshaw the sum of £142 15*s.* 6*d.*, which he had retained to await the result of the petition for liquidation.

On the 19th of December a petition for adjudication in bankruptcy was filed by another of Condon's creditors. This petition was filed under Rule 267 of the Bankruptcy Rules, 1870, and stated the filing of the petition for liquidation by arrangement, and that no resolution had been passed at the meeting of creditors, and that no other proceedings had taken place under the petition for liquidation.

On the 10th of January, 1874, Condon was adjudicated bankrupt, and Mr. J. E. James was appointed trustee of his estate.

Soon after the appointment of the said trustee the solicitors for the trustee threatened Bradshaw with proceedings if the money received by him from the sheriff was not paid over to the trustee, and on the 23rd of February, 1874, Bradshaw, being advised that, according to the law as then laid down, he would have no defence against such proceedings, paid the sum of £142 15*s.* 6*d.* to the trustee.

After the decision of the case of *Ex parte* Villars by the full Court of Appeal,[1] Bradshaw applied to the trustee to refund the money, and the matter having been brought before the Registrar, on the 26th of June he made an order to that effect. From this decision the trustee appealed.

Mr. *Thesiger*, Q. C., and Mr. *Cooper Willis*, for the appellant.

Mr. *De Gex*, Q. C., and Mr. *Finlay Knight*, for the execution creditor.

Sir W. M. JAMES, L. J. I am of opinion that the order of the Registrar must be affirmed. I adhere to the opinion which I expressed in *Ex parte* Villars, that the rights of an execution creditor ought to be respected except so far as the Act of Parliament has expressly interfered with them. In levying his execution, he has only done what he had a right to, and he is entitled to enjoy the proceeds of it unless he is restrained from so doing by the Act. The onus of proof is thrown on those who desire to show that he ought not to reap the fruits of his execution.

In this case it is impossible to say that the adjudication of bankruptcy was made on any petition of which the sheriff had notice before he paid the money to the execution creditor. If before the proceedings in liquidation had failed, another petition had been presented before the money had been paid over by the sheriff, it would have been a different case. But the result of what took place at the meeting of the 16th of December was, that the proceedings under the petition for liquidation came hopelessly to an end. There was nothing in the nature of a resolution, nothing that could result in the appointment of a trustee. Any creditor might, if he had chosen to do so, have presented a petition for adjudication within the fourteen days, and thus have intercepted the right of the execution creditor;

[1] L. R. 9 Ch. Ap. 433.

but this was not done, and I think, therefore, that the sheriff was justified in paying over the money, and that the execution creditor was entitled to keep the proceeds of the sale.

With regard to the other point, that the money was voluntarily paid to the trustee under a mistake of law, and not of fact, I think that the principle that money paid under a mistake of law cannot be recovered must not be pressed too far, and there are several cases in which the Court of Chancery has held itself not bound strictly by it. I am of opinion that a trustee in bankruptcy is an officer of the court. He has inquisitorial powers given him by the court, and the court regards him as its officer, and he is to hold money in his hands upon trust for its equitable distribution among the creditors. The court then, finding that he has in his hands money which in equity belongs to some one else, ought to set an example to the world by paying it to the person really entitled to it. In my opinion the Court of Bankruptcy ought to be as honest as other people. The appeal must be dismissed, but without costs.

Sir G. MELLISH, L. J. I am of the same opinion. This case cannot, in principle, be distinguished from *Ex parte* Villars,[1] as to the construction of the 87th section. Although a petition for adjudication is alone mentioned in it, it must be understood, under sect. 125, to apply equally to a petition for liquidation by arrangement, and therefore it must be read as if a petition for liquidation had been mentioned in it. When, therefore, the sheriff has received notice of a liquidation petition having been filed, he is bound to keep the proceeds of the sale beyond the fourteen days, until he knows whether the proceedings under the petition have come to an end or not. The question is, therefore, what in the case of proceedings in liquidation corresponds to an adjudication in bankruptcy? The 87th section says in effect that the sheriff is to keep the proceeds of the sale until he has ascertained whether the debtor against whom the bankruptcy petition has been presented is or is not adjudicated bankrupt on that petition or any other petition of which the sheriff has notice; and, by the 125th section, the appointment of a trustee under a liquidation petition is made equivalent to an adjudication in bankruptcy. I am of opinion that when, on the 16th of December, the creditors dispersed without coming to any resolution, all proceedings under the liquidation came to an end, and it became impossible, under that petition, that a trustee should be appointed. But it is contended that, although it was impossible that a trustee should be appointed, it was possible for the debtor to be adjudicated bankrupt on the declaration of insolvency contained in the petition for liquidation, and that the sheriff ought to have kept the proceeds of the sale until he had seen whether this would be done or not. In my opinion it would be a very inconvenient construction to put upon the 87th section. The effect would be, that the sheriff would have to keep the money for six months, because, at any time within that period, a bank-

[1] L. R. 9 Ch. Ap. 432.

ruptcy petition founded on the liquidation petition might be presented against the debtor. It was argued that the 267th rule only requires that notice shall be given to the court, and not that a petition shall be filed in the event of neglect on the part of the creditors to pass a resolution for liquidation. But I think that it is not competent to the court to apply the General Rules in such a way as to take away from an execution creditor the rights given him by the Act of Parliament, and that, according to the true construction of the 125th section, it was not contemplated that a debtor who has filed a liquidation petition should be adjudicated bankrupt on the petition for liquidation without a petition in bankruptcy, unless the case came within the 12th sub-section of that section. Whether, under that sub-section, the debtor could be adjudicated bankrupt without a petition in bankruptcy, it is not necessary now to decide, because it appears to me that that sub-section only applies to cases in which the creditors have passed a resolution and made some progress in the liquidation. The Chief Judge has very properly decided that an application under the 167th rule must be made by petition. At any rate, in my opinion, an execution creditor cannot have his rights taken away by the Rules.

I am therefore of opinion, consistently with *Ex parte* Villars,[1] that as soon as the prosecution of the proceedings in liquidation became impossible, the sheriff, having no notice of any other petition, was justified in paying over the money to the execution creditor, and that it cannot be recovered from him.

With respect to the second point, namely, the payment of the money to the trustee under a mistake of law, I entirely agree with the observations of the Lord Justice.

I also agree that the appeal should be dismissed without costs.

Ex parte SIMMONDS. *In re* CARNAC.

IN THE COURT OF APPEAL, OCTOBER 30, 1885.

[*Reported in Law Reports,* 16 *Queen's Bench Division,* 308.]

APPEAL by the trustee in the liquidation of Sir John Rivett Carnac against an order of Mr. Registrar MURRAY, that the trustee should, out of the debtor's estate, repay to G. E. Seymour, the surviving trustee of the settlement made on the marriage of Sir J. R. Carnac, a sum of £569 2*s.* 2*d.*, which J. W. Ede, a deceased trustee of the settlement, had paid to the trustee in the liquidation.

By the settlement, dated the 30th of November, 1840, a sum of £5000 was vested in Ede and Seymour, upon trust to invest the same in Govern-

[1] L. R. 7 Ch. Ap. 432.

ment or real securities, and to pay the income thereof to Sir John for his life, and after his death to his wife for her life, and, after the death of the survivor of them, the trust fund was to be held in trust for the children and other issue of the marriage. The £5000 was invested in the purchase of a sum of £5446 2*s.* 11*d.* consols, in the names of the two trustees. In the year 1857, at the request of Sir John, the consols were sold by the trustees, and part of the proceeds of sale were invested in the purchase of £2200 guaranteed 4 per cent stock of the North Eastern Railway Company (a security not authorized by the settlement), and the residue, amounting to £3000, was advanced to Sir John. This was done upon the terms of an agreement, a memorandum of which was contained in an account book kept by Ede, who was the acting trustee of the settlement.

This memorandum was as follows: —

"Sir John and Lady R. Carnac's Trust Fund.

"£5446 2*s.* 11*d.* consols were, at the request of Sir John and Lady Carnac, sold by John W. Ede and George Edward Seymour, the trustees.

"Out of the proceeds £3000 were advanced to Sir John Carnac on the security of his bond, at 4 per cent per annum. His life policy for £3200 in the London Life Office was also assigned to the trustees as additional security. The balance was invested in the purchase of £2200 North Eastern Railway guaranteed 4 per cent stock.

"The dividend usually received by Sir J. Carnac on £5446 2*s.* 11*d.* consols, being £81 13*s.* 10*d.* half-yearly, less income tax, to be paid him as before, and the balance invested and added to the capital for the benefit of his children, on the same trusts as the £5446 2*s.* 11*d.* consols were held.

"The trustees can sell the guaranteed stock at any time, and invest the proceeds in other railway guaranteed or preference stock, or in Government securities.

"When £400 of such stock shall have been added, the interest on the bond for £3000 to be reduced to 4 per cent per annum.

"Dated the 15th of April, 1857.

"We agree to the above.

"(Signed) J. R. Carnac,

"Anne Rivett Carnac."

This arrangement was carried out until, in 1875, Sir John filed a liquidation petition. During that period of eighteen years Sir John paid the premiums on the policy, and Ede paid to him half-yearly the difference between the dividend, to which he would have been entitled if the consols had not been sold, and the interest on the £3000, which he was bound to pay under the agreement. The surplus income of the railway stock was accumulated and invested as provided by the agreement.

After the commencement of the liquidation, Sir John failed to pay the premiums on the policy, and Ede paid them out of the income which he received as trustee, and, in consequence of a notice served on him by the trustee in the liquidation, he, from 1875 down to 1883, paid the whole of the surplus of the income which he received to the trustee. The sums thus paid amounted to £861 6*s.* 8*d.* In 1883, Sir John died, and the £3000 was repaid to the trustees of the settlement out of the proceeds of the policy.

The trustees of the settlement were afterwards advised that they had been wrong in making these payments to the trustee in the liquidation, and they, in April, 1884, applied to the Court of Bankruptcy for an order that the trustee in the liquidation should, out of any assets then in his hands, not disturbing any dividends already declared, or out of the first assets thereafter to come to his hands, repay to the trustees of the settlement the sum of £861 6*s.* 8*d.* Upon this application (Ede having meanwhile died) the registrar made the order appealed from. The sum of £569 2*s.* 2*d.* represented the amount of the payments made by Ede to the trustee in the liquidation within six years before the date of the notice of the application to the court.

The trustee in the liquidation deposed that the whole of the moneys paid to him by Ede, except the sum of £56 (retained on account of the expenses of the liquidation) had been distributed in dividends amongst the creditors of Sir J. R. Carnac.

Cooper Willis, Q. C., and *Alexander*, for the appellant.

J. G. Wood, for the respondent.

Lord ESHER, M. R. (after stating the facts), continued: — The demand made by the trustee in the liquidation upon the trustee of the settlement was wrong in point of law, but the trustee of the settlement acceded to it. The money was paid erroneously; they were both in error in point of law. It is immaterial whether the liquidation trustee knew of the agreement of April, 1857; the settlement trustee did; it was in his own handwriting, and he had acted upon it for years. The question is, what ought the court to do when the mistake is discovered? When I find that a proposition has been laid down by a court of equity or by the Court of Bankruptcy which strikes me as a good, a righteous, and a wholesome one, I eagerly desire to adopt it. Such a proposition was laid down by JAMES, L. J., in *Ex parte* James.[1] A rule has been adopted by courts of law for the purpose of putting an end to litigation, that, if one litigant party has obtained money from the other erroneously, under a mistake of law, the party who has paid it cannot afterwards recover it.[2] But the court has never intimated

[1] L. R. 9 Ch. 609.

[2] Undoubtedly there are cases in the courts of common law in which it has been held that money paid under a mistake of law cannot be recovered, and it has been further held that, under certain circumstances, the giving credit in account may be treated as so

that it is a high-minded thing to keep money obtained in this way; the court allows the party who has obtained it to do a shabby thing in order to avoid a greater evil, in order, that is, to put an end to litigation. But JAMES, L. J., laid it down in *Ex parte* James [1] that, although the court will not prevent a litigant party from acting in this way, it will not act so itself, and it will not allow its own officer to act so. It will direct its officer to do that which any high-minded man would do, viz., not to take advantage of the mistake of law. This rule is not confined to the Court of Bankruptcy. If money had by a mistake of law come into the hands of an officer of a court of common law, the court would order him to repay it as soon as the mistake was discovered. Of course, as between litigant parties, even a court of equity would not prevent a litigant from doing a shabby thing. But I cannot help thinking that, if money had come into the hands of a receiver appointed by a court of equity through a mistake of law, the court would, when the mistake was discovered, order him to repay it. A trustee in bankruptcy has always been treated as an officer of the Court of Bankruptcy, and the court will order him to act in an honorable and high-minded way, and so it was laid down by JAMES and MELLISH, L. JJ., in *Ex parte* James.[1] It is true that in that case the money in question had not been divided among the creditors, but was still in the hands of the trustee, and we are about to carry the principle of this decision somewhat further. But, though the money has been divided among the creditors, the court sees that other moneys, which would be applicable to the payment of dividends to the creditors, are about to come into the hands of the trustee, and it has not been shown that any injury will be done to any one by ordering the trustee to apply this money which is coming to him to replace the other money which was paid to him in error, and I think it is right that it should be so applied. In my opinion, the Registrar's order was right, and the appeal must be dismissed.

COTTON, L. J. The first question is, whether the payments made to the trustee in the liquidation were erroneous in point of law, and in my opinion they were. Can the money thus wrongly paid be now recovered from the trustee? Undoubtedly it cannot be recovered from him personally, but that is not the order which has been made. The order is that the trustee do repay the amount out of moneys which it is assumed are or will be in his hands, i. e., moneys available for the payment of dividends to the creditors. In my opinion it would be wrong to interfere with any right of the trustee to be paid his costs and expenses incurred in the liquidation, and the registrar's order must be taken to mean that the repayment is to

far equivalent to payment as to prevent sums wrongly credited being made the subject of set-off. But in equity the line between mistakes in law and mistakes in fact has not been so clearly and sharply drawn. — Sir ROBERT P. COLLIER, in Daniell *v.* Sinclair, L. R. 6 Ap. Cas. 186, 190. — ED.

[1] L. R. 9 Ch. 609.

be made out of moneys available for the payment of dividends. Ought it then to be made out of these moneys? The trustee relies on the ordinary rule, that money paid under a mistake of law cannot be recovered in an action between litigant parties. That no doubt is so. But the present case stands in quite a different position. The trustee in the liquidation has, or will have, funds in his hands, and the question is, how ought they to be applied? It is said that they ought to be applied in paying dividends to the creditors. Of course they ought, unless there is some prior claim to them. It cannot be said that there is any lien upon the moneys in the trustee's hands in respect of the sum which was paid to him by mistake. But the funds applicable to the payment of dividends to the creditors have been erroneously increased by means of that payment to the trustee, and the question is whether the sum thus paid in error ought not to be repaid out of those funds. In my opinion *Ex parte* James[1] lays down this proposition, that when the officer of the court has in his hands a sum of money which has been paid to him erroneously under a mistake of law, the ordinary rule as between adverse litigants does not apply, but he will be ordered to repay it. It has been urged, and rightly urged, that in *Ex parte* James[1] the money was still in the hands of the trustee, whereas in the present case the money has been distributed among the creditors, and that our decision will be a development of the principle of *Ex parte* James.[1] But, in my opinion, we must regard the funds available for distribution among the creditors under a bankruptcy or liquidation as one entire fund, and, if that fund has been erroneously increased, I think it is a just extension of *Ex parte* James to say that, out of any moneys which may hereafter be in the hands of the trustee and applicable to the payment of dividends to the creditors, the amount which has come into his hand by mistake ought to be repaid. If the trustee desires it the registrar's order may be qualified by saying, that the repayment is to be made out of any moneys which may now or hereafter be in the hands of the trustee and applicable to the payment of dividends.

LINDLEY, L. J. I think that the mistake of law is established, and the question is, whether it can be put right now? If it can, it certainly ought to be put right. I think it can. The court by means of its officer has made a mistake, and has given to the creditors money which they ought not to have had. It would, I think, be unjust to make the creditors refund what they have thus received. But what is there unjust in saying, that no more money shall go to them until this sum has been repaid to its rightful owner? It appears to me there will be no injustice in giving such a direction to the trustee. *Ex parte* James[1] is an authority for doing so, but, even without that authority, I should have thought that the injustice which has been inadvertently done could be set right.

Appeal dismissed.

[1] L. R. 9 Ch. 609.

CLARKE *v.* DUTCHER.

IN THE SUPREME COURT OF NEW YORK, AUGUST, 1824.

[*Reported in* 9 *Cowen*, 674.]

ON error from the Court of Common Pleas of Otsego county. Dutcher sued Clarke on the 8th of January, 1821, by summons, in a justice's court of that county; and declared that he, Dutcher, then was, and had been from the spring of 1785, in the possession and occupation of lot No. 36 containing 100 acres, in the Cherry Valley patent, as a tenant to Clarke, at an annual rent of 6*d.* sterling an acre, or £2 10, sterling for the whole lot; that the defendant Clarke, from that time to the present had demanded, and the plaintiff Dutcher had been obliged to pay, and had paid £4 14 York currency per year for the annual rent, to the defendant, being about 64 cents more than the actual rent reserved on the lot; and that when the plaintiff took possession, there was rent due on the lot from 1741, which the plaintiff had been obliged to pay, and had paid at the same rate; and which was more than the annual rent reserved on the lot. The second count stated the same facts, and added that the plaintiff paid the money in ignorance of his own rights. The third count was for the interest paid by the plaintiff at different times on the rent. The fourth count was for compound interest paid on the same rent. The fifth and last count was for money lent, money paid, etc., and money had and received generally. Pleas, the general issue, also the statute of limitations to all the plaintiff's demand except for the last six years, also the statute of limitations to the whole demand, also a set-off for rent due on the same lot.

On the trial (January 18, 1821), the plaintiff gave in evidence a lease in fee of lot 36, dated March 10, 1755, from the defendant's ancestor Geo. Clarke, the colonial lieutenant-governor of N. Y., to one Ramsay, reserving the annual rent of £2 10*s.* sterling, and receipts for the following sums, at the following dates, as paid by the plaintiff to the defendant: July 26, 1797, £31 1*s.* 5½*d.* in full of arrears to the 29th of September, 1796. On the receipt for this sum was endorsed a statement of rent due from June 15, 1767, to July 26, 1797 (deducting eight years for the war), at £148 1*s.* Other receipts were dated February 3, 1791, for £4 14*s.* April 23, 1794, for £20. October 29, 1796, for £16 14*s.* November 10, 1796, for £20. (These receipts were all included in a settlement between the parties July 26, 1797.) March 21, 1798, for £4 14*s.* June 22, 1804, for $20, and the plaintiff's bond for $65.10 for 6 years' rent, and interest on same. July 16, 1814, for £32 18*s.* in full for rent to September 29, 1813, inclusive; and £9 2*s.* 5*d.* in full of interest; and $10 costs. June 14, 1815, for £4 14*s.* rent, and 4*s.* 8*d.* interest. October 1, 1817, for $24.87 in

full for rent for two years. January 31, 1820, for £9 8*s.* rent and 11*s.* interest. January 8, 1821, for £4 14*s.* It was admitted that on Monday, before the trial, the plaintiff sent $16 for rent to the defendant, which he refused to receive, saying he would set it off on the trial. Judgment for the plaintiff of $50, with costs; whence the defendant appealed to the Common Pleas.

The cause was tried in the C. P. in June, 1821. On the trial, the plaintiff proved the lease in evidence before the justice, and that he had been in possession of the lot 36, for about 30 years claiming under it. The plaintiff then proved the receipts above set forth, as in evidence before the justice; and a witness for the plaintiff testified, that allowing all the rent to have been regularly paid by the plaintiff since the 29th of September, 1796, at £4 14*s.* currency *per annum*, he would have overpaid $66.48, allowing all the rent to have been regularly paid by the plaintiff from the 29th of September, 1796, at £4 14*s.* currency *per annum.*

To meet the plea of the statute of limitations, the plaintiff called his son Joseph Dutcher, who testified that after the commencement of this suit in the justice's court, the defendant called on the plaintiff, and requested to know why he had sent a summons for him? To which the plaintiff answered he had been informed that he, the defendant, had taken too much rent of him; say four or five shillings per year: to which the defendant replied, "It has been an old custom of mine to take so much." The plaintiff asked the defendant if custom made law; who said he did not know that it did in this case.

Another witness for the plaintiff stated that he had cast the rent, and found overpaid to the defendant on the 29th of September, 1796, $41.56, deducting, as appeared to have been done by the paper showing the settlement at that time, eight years' rent for the war. If the eight years' war were allowed the defendant, there would be due him at that time $47.32; but the witness had not allowed any interest on rent arrear. The defendant's general agent, Mr. Morrell, proved a calculation by himself of all arrears of rent and interest except for eight years of war, and of payments made to the defendant up to July the 16th, 1814, and made due to the defendant at that time a balance of £16 10*s.* 11*d.* He also proved a calculation on the same principles, from the 29th of September, 1814, inclusive, to the 8th of January, 1821, the time of the last payment; and made the balance £4 8*s.* 8*d.* Adding the £16 10*s.* 11*d.* made £25 9*s.* 11*d.* = $74.82 then due the defendant. He stated that he had refused a tender of 16 dollars as a balance of rent due the defendant, made by the plaintiff on the 15th of January, 1821, after the suit commenced before the justice. In answer to a question put by the plaintiff's counsel, he said the reason the defendant assigned for claiming £4 14*s.* currency for £2 10*s.* sterling reserved by the lease was, that after the war, the rate of exchange being against this country, his tenants had agreed to pay that sum in consideration that he would deduct eight years' rent for the war. That he did not exact or demand it;

but if the tenants declined paying it, he took the £4 8*s.* 11*d.* The witness further stated, that in making up the balances, as he had sworn to them, he cast the interest on the rent of each year separately, to the time of the payment; and if the payment at that time equalled or exceeded the interest then due, he added the interest to the principal, and deducted the payment; but if the payment did not equal the interest, he cast the interest on the rents to the time when the sum of the payments equalled or exceeded the interest then due, then added the interest to the principal, and deducted the payments and the interest on the payments from the principal and interest. The testimony of Mr. Morrell, explaining one of the receipts, will be found stated in the opinion of the court.

The court below decided, and so charged the jury, that the tender of the $16 was not conclusive that so much rent was due to the defendant. That the excess of payments were not to be deemed made in ignorance of the law, but of the facts, — the rent being reserved in sterling money, but estimated and paid in currency; and that the action, therefore, would lie for the excess, unless barred by the statute of limitations; that the receipts of July 26, 1797, and of July 14, 1814, were evidence that settlements were then made, and that the parties could not go back beyond either of those periods, unless the testimony of Joseph Dutcher should be deemed sufficient to take the case out of the statute of limitations; that this was a question of fact for the jury. If they thought there was evidence of an admission of indebtedness by Clarke, or a new promise by him, they might go through the whole accounts; otherwise not; that the matters in evidence on the part of the defendant were not a conclusive bar of the plaintiff's action. To all these several decisions the defendant excepted. The jury found a verdict for the plaintiff with $50 damages, upon which the C. P. rendered judgment with costs; and the defendant brought error to this court.

G. Morrell, for the plaintiff in error.

I. Seelye, for the defendant in error.

Curia, per SUTHERLAND, J. The demand of the plaintiff below must be limited to the six years preceding the commencement of his suit. The admission by Clarke that it had been an old custom of his to take four or five shillings more rent than was reserved in the lease, is not sufficient to open all the antecedent accounts between the parties. The conversation commenced by Clarke's asking Dutcher why he had issued a summons against him. From which it may be inferred, that it was soon after the issuing of the summons, and before the declaration was put in before the justice. He could not then have known that Dutcher sought to recover back any payment made prior to the last six years. It ought clearly to appear in all such cases, that the acknowledgment related to the identical debt or demand which is sought to be recovered upon the strength of it. Sands *v.* Gelston.[1]

This was not a case of open unliquidated mutual accounts. The receipt

[1] 15 Johns. 511.

of July 16, 1814, settled all accounts between the parties in relation to the rent on lot No. 36, up to September 29, 1813. If the plaintiff below, upon that settlement, paid by mistake more than he ought to have paid, the error might have been corrected at any time within six years, and the excess recovered back, provided the mistake was of a character by which the law did not hold him concluded. But having slept upon his rights until the statute of limitations has attached, and having failed to show an acknowledgment on the part of the defendant sufficient to take the case out of the statute, no inquiry can now be had into any accounts between the parties in relation to the rent, prior to that settlement.[1]

Where there is any dispute as to the facts which go to prove the making of a new promise, there, whether a sufficient acknowledgment or promise has been made to take the case out of the statute, is a mixed question of law and fact, to be passed upon by the jury. But when the facts are undisputed, it is for the court to determine whether they take the case out of the statute or not. Here it was not denied that Clarke made the declaration relied upon as evidence of an acknowledgment of the debt. Whether it amounted to a sufficient acknowledgment or not, was an unmixed question of law.

The opinion expressed by the court was erroneous, and properly excepted to.

If the plaintiff's demand is limited to the period subsequent to the settlement of July 16th, 1814, he has no ground for a recovery. Since that period, there has been no final settlement between the parties. All the receipts have been upon account, except that of October 1, 1817, given by Walter to Webb for $24.87, which purported to be in full for two years' rent. Mr. Morrell swears expressly that Mr. Webb had no authority to give a receipt in full; that his instructions to his clerks, of whom Webb was one, were to receive any money which Mr. Clarke's tenants should pay, and give receipts on account. That receipt, therefore, is to be considered as a receipt on account merely. Now the rent which has fallen due since September 29, 1813, up to which period it was settled by the receipt of July 16, 1814, and the commencement of this suit, without calculating any interest, exceeds by some dollars the amount paid by the plaintiff. Mr. Morrell states the balance of principal and interest due Mr. Clarke, upon an accurate calculation upon this principle, on the 8th day of January, 1821, when this suit was commenced, to have been $10.73. Whether Mr. Clarke, therefore, exacted and received from the plaintiff at any period more rent than was then due to him, is not the question. Whatever he received, he passed to the general credit of the plaintiff; and in this action the inquiry is, has the defendant received more from the plaintiff for rent than he was entitled to? The evidence clearly shows that he has not; and the plaintiff below, therefore, is not entitled to recover.

[1] A portion of the opinion relating to a question of practice has been omitted. — Ed.

But it was said, upon the argument, that as more than $50 had been paid by the plaintiff to the defendant for rent within six years, the judgment was supported, whether the opinion expressed by the court as to the statute of limitations was right or wrong. It is undoubtedly true, that a judgment will not be reversed on account of an erroneous opinion expressed, or decision made by the court, where it clearly appears that the error did not or could not have affected the verdict or the judgment. But this very position implies that we are to look beyond the letter of the exception into the case itself, to ascertain what the effect of the error was. Now it is perfectly clear that if the court had charged the jury that all accounts between the parties prior to the last six years were barred by the statute of limitations, they could not have given a verdict for the plaintiff; for within the last six years, he had not paid as much as he owed the defendant; and this point, therefore, properly arises upon this exception.

But although this view of the case, if I am correct in it, is conclusive, it may be well briefly to consider that which, upon the argument, was treated as the main point in the cause. It is embraced in the exception, that the payments made by the defendant in error were made voluntarily, with a full knowledge of all the facts in the case; and admitting that they exceeded the amount legally due, and that the statute of limitations was out of the question, the excess could not be recovered back, the mistake being in law and not in fact.

Although there are a few *dicta* of eminent judges to the contrary, I consider the current and weight of authorities as clearly establishing the position, that where money is paid with a full knowledge of all the facts and circumstances upon which it is demanded, or with the means of such knowledge, it cannot be recovered back upon the ground that the party supposed he was bound in law to pay it, when in truth he was not. He shall not be permitted to allege his ignorance of law; and it shall be considered a voluntary payment.

This position was broadly stated by BULLER, J., in Lowry *v.* Bourdieu,[1] without any question, or the expression of any doubt or disapprobation by the rest of the judges. Although it is true that that case may have been, and probably was determined on the ground that the policy upon which the premium had been paid was a gaming policy, that the parties were in *pari delicto*, and that the law would not aid the plaintiff in recovering back what he had paid under such circumstances; still it is not to be supposed that Lord MANSFIELD and Mr. Justice ASHURST would have suffered the *dictum* to have passed without animadversion, if they had not assented to its correctness.

In Knibbs *v.* Hall,[2] a tenant was not permitted to recover back from his landlord, or to be allowed by way of set-off, a sum of money which he had paid beyond the rent which was actually due from him. The landlord de-

[1] Dougl. 470. [2] 1 Esp. 83.

manded 25 guineas, and threatened him with a distress if he did not pay it. The tenant insisted that he had taken the premises at 20 guineas, and offered to pay that sum; but under the supposition that he could not defend himself against the distress, paid the 25 guineas, and was not permitted to recover back or set off the excess, it being held a voluntary payment. So in Brown *v.* McKinnally,[1] and Marriott *v.* Hampton,[2] the same principle was recognized.

In Buller *v.* Harrison,[3] the money was paid under a mistake in fact. The assurer, upon a representation that a loss had been sustained by one of the perils covered by the policy, paid the insurance to the agent of the assured. But soon learning that it was a "foul loss," in the language of the case, he gave notice to the agent of the fact, and also not to pay over the money. The only question discussed in the case was, whether in judgment of law the money had been paid over by the agent before he received the notice. The plaintiff's right to recover against the principal was not questioned.

The case of Bilbie *v.* Lumley and others,[4] was also an action by an underwriter, to recover back from the assured £100 which he had paid upon the policy. The ground on which the action was brought was, that the money had been paid under a mistake, the defendant not having disclosed to the plaintiff, at the time the insurance was effected, a letter relating to the time of the sailing of the ship insured, which it was admitted was material. But it appeared that before the loss was adjusted and the money paid on the policy, all the papers, including the letter in question, were submitted to the plaintiff. The counsel for the plaintiff put his case on the broad ground that it was sufficient to sustain the action that the money had been paid under a mistake of the law, the plaintiff not being apprised at the time of the payment, that the concealment of the particular circumstance disclosed in the letter was a defence to any action which might have been brought on the policy. When the case was stated at bar, Lord Ellenborough would not hear it argued. He said he had never heard of a case in which a party who had paid money to another voluntarily, with a full knowledge of all the facts of the case, had been permitted to recover it back, on account of his ignorance of the law, except the case of Chatfield *v.* Paxton (in a note to Bilbie *v.* Lumley), in which Lord Kenyon, at *nisi prius*, had dropped an intimation of that sort. Now, upon examination, it will be found that in the case of Chatfield *v.* Paxton, a majority of the judges put the case upon the ground that the payment had been made by the plaintiff, not with a full knowledge of the facts, but only under a blind suspicion of the case. Lord Ellenborough says that it was so doubtful on what point that case turned, that it was not ordered to be reported.

In Stevens *v.* Lynch,[5] the plaintiff was the indorser, and the defendant

[1] 1 Esp. 279. [2] 2 Esp. 546. [3] Cowp. 555.
[4] 2 East, 469. [5] 12 East, 38.

the drawer of a bill of exchange. The defence was, that the plaintiff had given time to the acceptor after his dishonor of the bill. But it appeared that the defendant, with a full knowledge of that fact, said, "I know I am liable, and if Jones (the acceptor) does not pay it, I will." The court say the defendant made the promise with a full knowledge of all the circumstances, and cannot now defend himself upon the ground of his ignorance of the law when he made the promise.

The cases of Chatfield *v.* Paxton and of Bize *v.* Dickason,[1] were cited for the plaintiff upon the argument. But the court said they considered those cases to have proceeded on the mistake of the person paying the money under an ignorance or misapprehension of the facts of the case.

In the late case of Brisbane *v.* Dacres,[2] this subject was elaborately considered by the Court of Common Pleas, and the principle of Bilbie *v.* Lumley recognized and adopted. Brisbane was the captain of a frigate belonging to a squadron under the command of Admiral Dacres, the testator of the defendant, upon the Jamaica station; and in obedience to the orders of the admiral, in April, 1808, he received on board his frigate $700,000 belonging to government, and proceeded with the same to Portsmouth. He also received on board between one and two millions of dollars belonging to individuals, to be delivered at the Bank of England. The government and individual money was delivered according to order, and Captain Brisbane received from the government for the freight of the former £850; and from the Bank of England, upwards of £7000 for the freight of the latter. He paid over to the admiral one third of the sums thus received, under the belief that he was legally entitled to it; but upon discovering that he was not, he brought this action to recover it back. It was shown to be the usage in the navy for the captains of vessels carrying public and private treasure, to pay one third of the freight for the same to the commander of the squadron to which they belonged, though it was admitted that since 1801 the admiral had in such cases no legal claim to any portion of the allowance. But the court held that the money, having been paid with a full knowledge of all the circumstances and facts in the case, could not be recovered back, because it had been paid under a misapprehension of the law. As to the freight for the money belonging to individuals, it was held that Captain Brisbane had no right to carry it; that the whole of that part of the transaction was illegal; and that, the parties being *in pari delicto*, the law would aid neither. But as to the other portion of the demand, it was put upon the broad ground which I have stated, against the opinion of Mr. Justice Chambre. Mr. Justice Gibbs says, where a man demands money of another as a matter of right, and he pays it with a full knowledge of the facts upon which the demand is founded, he never can recover back the sum he has so voluntarily paid. By submitting to the demand, he that pays the money *gives* it to the person to whom he pays it, and closes the trans-

[1] 1 T. R. 285. [2] 5 Taunt. 144.

action between them. He who receives it has a right to consider it as his without dispute; and it would be most mischievous and unjust, if he who has acquiesced in the right by such voluntary payment should be at liberty, at any time within the statute of limitations, to rip up the matter, and recover back the money.

Against these cases and a variety of others in which the same principle is acknowledged with more or less distinctness, there is nothing to oppose but the *dictum* of DE GREY, Ch. J., in Farmer *v.* Arundel,[1] and of Lord MANSFIELD in Bize *v.* Dickason.[2] The observation of Ch. J. DE GREY is, that "When money is paid by one man to another, as a mistake either of fact or of law, or by deceit, an action will lie to recover it back." But in that case the action was not sustained, although the money had been paid by the plaintiff under a clear mistake of law. The case, therefore, not only did not call for the *dictum*, but is in direct hostility with it. The proposition of Lord MANSFIELD in Bize *v.* Dickason was, that "Where money is paid under a mistake, which there was no ground to claim in conscience, the party may recover it back in an action of assumpsit." If his Lordship meant mistake in fact, the proposition is undoubted; and that he did so mean and express himself, Mr. Justice GIBBS, in his opinion in Brisbane *v.* Dacres, infers with great force, from the circumstance that Lord MANSFIELD had six years before, in Lowry *v.* Bourdieu, heard it said by Mr. Justice BULLER, that "money paid in ignorance of the law could not be recovered back," and had not dissented from the doctrine; and BULLER, Justice, sat by him in Bize *v.* Dickason, and would not have heard the contrary of that doctrine stated without noticing it. The only point to which the attention of the defendant's counsel, in Bize *v.* Dickason, seems to have been directed was, whether the case came within the principle of Grove *v.* Dubois;[3] and the court having expressed an opinion that it did, he abandoned the case, without adverting to the distinction that in Grove *v.* Dubois the broker had been allowed merely to set off his demand, and here he sought to recover back a sum which he had actually paid.

Chief Justice MANSFIELD, in Brisbane *v.* Dacres, in adverting to these propositions of Ch. J. DE GREY and Lord MANSFIELD, says, "It certainly is very hard upon a judge, if a rule which he lays down generally is to be taken up and carried to its full extent. Great caution ought to be used by the court in extending such maxims to cases which the judge who uttered them never had in contemplation."

If money paid under a mistake of the law, though with a full knowledge of the facts in the case, can be recovered back in all cases where the party to whom it is paid is not in conscience and equity entitled to it, what is the practical distinction between a mistake in fact and a mistake in law. A party who has paid money under a mistake in fact cannot recover it back unless he is equitably entitled to it. The inquiry in every case, therefore,

[1] 2 Black. R. 825. [2] 1 T. R. 285. [3] 1 T. R. 112.

must be, not whether the money was paid under a misapprehension of the law, or in ignorance of the fact, for that is immaterial, but whether the party to whom it was paid can in equity and conscience retain it. If he cannot, if there was any mistake of any character, he shall refund.

If this be so, why has this question been so frequently and elaborately discussed, not only in the English, but in our own courts; and not only in the courts of common law, but in courts of equity? How are the cases of Bilbie *v.* Lumley and of Brisbane *v.* Dacres to be reconciled with this principle? What ground of conscience or equity had Admiral Dacres for retaining the money paid to him? He had neither incurred hazard nor rendered any labor or service in its transportation. Captain Brisbane was not his servant, nor was the ship which carried it his property. Chief Justice MANSFIELD, in his solicitude to avoid collision with the *dicta* of Chief Justice DE GREY and Lord MANSFIELD, does indeed suggest a ground of equity for the defendant. He says, "So far from its being contrary to *æquum et bonum*, I think it would be most contrary to *æquum et bonum* if he were obliged to repay it; for see how it is: If the sum be large, it probably alters the habits of his life; he increases his expenses; he has spent it over and over again; perhaps he cannot pay it at all, or not without great distress." If the fact of having expended the money, or of its being inconvenient to repay it, is a sufficient ground of equity to enable the party who has received it under a mistake of law to retain it, I apprehend that it will practically amount to the same thing as holding that it shall not be recovered back. But with great respect, I think his Lordship might better have denied those *dicta* to be law, as Lord ELLENBOROUGH did in Bilbie *v.* Lumley, than to have sought to evade them by this gloss.

Chief Justice MARSHALL thought there was a distinction between a mistake in fact and a mistake in law, when he said, in Hunt *v.* Rousmanier.[1] "Although we do not find the naked principle that relief may be granted, on account of ignorance of law, asserted in the books, we find no case in which it has been decided that a plain and acknowledged mistake in law is beyond the reach of equity." Chancellor KENT thought such a distinction existed, when he said, in Lyon *v.* Richmond,[2] "Courts do not undertake to relieve parties from their acts and deeds fairly done, on a full knowledge of facts, though under a mistake of the law. Every man is to be charged at his peril with a knowledge of the law; there is no other principle which is safe or practicable in the common intercourse of mankind." The principle upon which courts refuse to relieve against mistakes in law is, that in judgment of law there is no mistake; every man being held, for the wisest reason, to be cognizant of the law. The act, therefore, against which the party seeks relief is his own voluntary act, and he must abide by it. This principle steers entirely clear of the conscience or equity of the transaction.

In this case, therefore, the rent having been reserved in sterling money,

[1] 8 Wheat. 215. [2] 2 Johns. 51.

and its value in our currency being fixed by statute, and therefore a question of law, if the plaintiff, on settling his rent at the rate of £4 14*s.* currency for £2 10*s.* sterling, acted under an erroneous impression that that was its legal value, he cannot now recover back the excess. The rent was demanded by the landlord as his right. By submitting to the demand, as Mr. Justice GIBBS expressed it, he *gives* the money to the party to whom he pays it, and closes the transaction forever. The judgment of the Common Pleas must be reversed.

Judgment of reversal.

HAVEN *v.* FOSTER.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, OCTOBER TERM, 1829.

[*Reported in* 9 *Pickering*, 112.]

ASSUMPSIT for money had and received, and money paid. The parties stated a case.

On the 19th of September, 1819, Andrew Craigie, of Cambridge in this Commonwealth, died there, intestate, seised in fee-simple of certain land in the State of New York, and of real estate of greater value in Massachusetts, leaving his niece Elizabeth, the wife of the plaintiff, and his three nephews, Andrew Foster, John Foster, and the defendant, his heirs-at-law, the niece being the child of the intestate's sister Elizabeth, and the nephews the children of his sister Mary, and all four being children of the same father, Bossenger Foster.

In October, 1819, administration upon the estate of Craigie was granted in this Commonwealth to his widow. No letters of administration were taken out in New York.

After the death of Craigie, the plaintiff and his wife, with Andrew and John Foster and the defendant, by their joint deed of release and quitclaim, dated November 17, 1821, conveyed all their right to the greater part of the intestate's land in New York to Thomas Tufts, of Le Roy, in that State, for the consideration in fact of $24,540, Tufts well knowing the nature of the title he acquired by this purchase. The deed was executed and acknowledged at Cambridge, and by agreement of the parties was carried by the plaintiff to Albany in the State of New York, where, on December 1, 1821, Tufts executed a bond of that date to each of the grantors, for one quarter part of the consideration of the deed, payable by certain instalments, with interest semi-annually at the rate of seven per cent, the legal rate of interest in New York, which bonds were secured by four several mortgages, each of one undivided fourth part of the lands conveyed to Tufts. The deed and bonds were placed by the plaintiff, but without

express authority from the other grantors, in the hands of J. V. Henry, a lawyer at Albany, with directions, upon the receipt of the mortgages executed and recorded, to transmit the deed to Tufts, and the bonds and mortgages to the respective obligees and mortgagees therein named. The bonds and mortgages were sent by Henry to the plaintiff, who delivered them to the several parties in whose names they were taken.

On the 9th of March, 1824, the whole amount of the bonds was paid to the obligees respectively, deducting from each the sum of $1,875, which was left in the hands of Tufts for the purpose of paying, and with which he undertook to pay, a debt of $7,500, due from Craigie's estate to Benjamin Lee; which debt arose out of a contract, dated April 19, 1819, between Craigie and Lee, for the loan of $15,000 by Lee to Craigie, which Craigie was to receive from Lee progressively, as stated in the contract. This contract was accompanied by a note for $15,000 made by Craigie to Lee, secured by a mortgage of part of the lands released by Craigie's heirs to Tufts. Craigie received $4,957 under this contract and the administratrix received $2,235, which sums, with interest to June 15, 1820, amounted to $7,500; and by an agreement dated July 17, 1820, the intended loan was reduced to that sum; which was to carry interest from June 15, 1820. At the time when Tufts undertook to pay this debt, Lee's right of action on the note, against the administratrix, was barred by Stat. 1791, c. 28, limiting suits against administrators to four years. By an arrangement between the administratrix and the heirs of Craigie, made in September, 1822, by virtue of which certain stock in this Commonwealth belonging to the intestate's estate came under the control and management of the heirs, it was stipulated, that among other claims the debt to Lee, of $7,500, should be paid out of the proceeds of the stock when sold; but the sale not having been effected at the time when Tufts proposed to make the before-recited payments to the plaintiff and John and Andrew Foster and the defendant, it was then further agreed between them and the administratrix, that the payment by them of the debt to Lee should have the same effect upon the rights of the parties in interest, as if it had been paid by her as administratrix, it not being then certain that the personal estate of the intestate would be sufficient to pay his debts. Tufts did not pay Lee any part of the debt, and in consequence of his neglect, Lee resorted to his remedy on his mortgage, and in pursuance of a decree in chancery in New York, satisfied the debt and costs by a sale of about half of the mortgaged premises. Before Lee obtained the decree, he had agreed with the plaintiff and John and Andrew Foster and the defendant, that for the satisfaction of his debt, he would resort only to Tufts and the land mortgaged, and would refund the interest paid on the note by the administratrix subsequently to the provision made for the payment of the debt through Tufts, — the plaintiff and John and Andrew Foster and the defendant agreeing that Lee might use the bond taken by them from Tufts for the payment of the debt to

Lee, and the judgment recovered by them thereon against the surety; which bond, and a copy of the judgment, were, about three years after the 9th of March, 1824, transmitted to Lee; and his attorney, on receiving on the bond and judgment, from the executrix of the last will of the surety, the amount of interest refunded by Lee to the estate of Craigie, and the costs of the suit on the bond, released the judgment; and Lee never made any other use of the bond and judgment, before the same were so released. On the 9th of March, 1824, the defendant received from Tufts the sum of $5,161.38 in full for the principal secured by his bond, and the interest thereon to the 6th of that month, and the further sum of $19.12 for compound interest thereon, making in the whole the sum of $5,180.50, after deducting $1,875, as before mentioned. The sum received has not been productive during the whole time since the 9th of March, 1824, and the defendant has received thereon for interest to the 9th of October, 1828, only $999.18.

On the 29th of May, 1826, the plaintiff and his wife, with John and Andrew Foster and the defendant, by their joint deed of release and quitclaim of that date, conveyed all their right in another parcel of land in the State of New York, of which Craigie died seised in fee simple, to David Lane of Hudson in that State, a part ($950) of the consideration of which was paid on that day and divided equally between the plaintiff and John and Andrew Foster and the defendant; one-fourth of which sum remains still in the defendant's hands.

The statute of New York of February 23, 1786, regulating descents, was in force at the time of Craigie's decease, according to which the children of his two sisters took *per stirpes* and not *per capita*: but of this statute all the parties interested in the estate of Craigie were ignorant at the time of the transactions before recited.

If upon these facts the court should be of opinion that the plaintiff was entitled to recover, judgment was to be rendered for him for such sum as the court should order; otherwise the plaintiff was to become nonsuit.

The case was argued in writing.

Metcalf for the plaintiff.

A. Hilliard for the defendant.

The opinion of the court was drawn up by

Morton, J [After stating some of the facts.] By the statute of distributions of this State these heirs, standing in the same degree of relationship to the intestate, inherited his estate in equal proportions. But by the statute of New York, which carries the doctrine of representation farther than the law of this State, or indeed than the civil or common law, these heirs inherited *per stirpes* and not *per capita*. So that the estate in New York descended, one-half to the wife of the plaintiff, and the other half to the defendant and his two brothers; being one-sixth instead of one-quarter to each.

Of the provisions and even existence of this statute, all the heirs were entirely ignorant during the whole of the transactions stated in the case. The plaintiff, having discovered the mistake, now seeks by this action to reclaim of the defendant one-third of the amount received by him on account of the sale of the New York lands, with interest from the time of its receipt. And the question now submitted to our decision is, whether he is entitled to a repetition of the whole or any part of this amount.

Had the parties been informed of their respective rights under the laws of New York, it cannot be doubted that the plaintiff would have retained one moiety of the land in that State, or would have received to himself one-half of the consideration for which it was sold. The distribution of the avails of the sale was made by the heirs upon the confident though mistaken supposition, that they were equally entitled to them. They acted in good faith, upon a full conviction that they were equal owners of the estate. It turned out, however, to the surprise of all of them, that they owned the estate in very unequal proportions, and that the defendant and his brothers had received not only the price of their own estate, but also the price of a part of the plaintiff's estate.

Equity would therefore seem to require, that the defendant should restore to the plaintiff the amount received for the plaintiff's estate. It was received by mistake, and but for the mistake would not have come to the defendant's hands. If the whole estate had been owned by the plaintiff, and the defendant, having no interest in it, had received the whole consideration, the equitable right of repetition would have been no stronger; it might have been more manifest.

The suggestion that the provisions of the New York statute are in themselves inequitable, is no answer to this view of the case. Whether the law of descent in that State is more or less reasonable and just than ours, it is neither our province nor desire to inquire. All statutes regulating the descent and distributions of intestate estate may be considered as positive, and in some degree, arbitrary rules. And when a person, by inheritance or purchase, becomes lawfully seised of any estate without fraud or fault on his part, it would be as inconsistent with sound ethics, as with sound law, to devest him of it because the rule of law by which he held it was deemed unreasonable. And if, by accident or mistake, another should get possession, it is not easy to see upon what principle he would be justified in retaining it.

In the case at bar, the division of the consideration money was made by the agreement of all the parties interested. The defendant received the money with the plaintiff's consent. But it was an implied, rather than express agreement.

The defendant also received the money under a claim of right. The defendant believed himself to be legally and equitably entitled to one-quarter part of the proceeds of the sale. And under this belief he claimed it as

being rightfully due to him, and the plaintiff, under the influence of the same belief, assented to the justice of the claim, and agreed to the equal distribution which was made.

It was not however paid to the defendant by way of compromise. No controversy existed between the parties. There was not even a difference of opinion between them in relation to their respective purparties in the estate before it was sold, or to the apportionment of the avails after the sale. There was therefore no room for concession on the one side or the other, and nothing between them which could be the subject of compromise.

Nor do the facts furnish any ground to presume that the plaintiff intended to grant anything to the defendant, or to yield any of his legal rights. *Nemo presumitur donare.* And we have no reason to believe that the plaintiff intended to give away any part of his own property, or his wife's inheritance.

The mistake in the distribution of the consideration money for which the land was sold, arose from the mutual ignorance of the law of descents in New York. Can this mistake be corrected and the plaintiff be restored to the rights which he had under this statute?

It is in the first place objected, that the plaintiff's ignorance was owing to his own negligence; that he shall not be allowed to take advantage of his own laches; that what a man may learn with proper diligence, he shall be presumed to know; and that against mistakes arising from negligence, even a court of equity will not relieve.

In all civil and criminal proceedings every man is presumed to know the law of the land, and whenever it is a man's duty to acquaint himself with facts, he shall be presumed to know them. But this doctrine does not apply to the present case. It was not the duty of the plaintiff to know the laws of New York, nor does ignorance of them imply negligence. Knowledge cannot be imputed to the plaintiff, and it is expressly agreed that he, as well as the defendant, was entirely ignorant of the statute of New York. Besides, it was as much the duty of the defendant as of the plaintiff, to be acquainted with the laws of New York. And if either is guilty of negligence, both are, in this respect, *in pari delicto.*

The objection that the title to real estate cannot be tried in this form of action, cannot avail the defendant; because it seems to us very clear, that no title is or can be drawn in question, in the present case.

The principal objection to the plaintiff's recovery, and the one most relied upon by the defendant's counsel, is, that the payment to the defendant was made through misapprehension of the law, and therefore that the money cannot be reclaimed.

It is alleged, that to allow the plaintiff to recover in the present action, would be to disregard the common presumption of a knowledge of the law, and to violate the wholesome and necessary maxim *Ignorantia juris quod quisque tenetur scire, neminem excusat.* This objection has been strongly

urged by the defendant's counsel, and learnedly and elaborately discussed by the counsel on both sides. It is believed that all the authorities applicable to the point, from the civil as well as the common law, have been brought before the court.

Whether money paid through ignorance of the law can be recovered back, is a question much vexed and involved in no inconsiderable perplexity. We do not court the investigation of it, and before attempting its solution, it may be well to ascertain, whether it is necessary to the decision of the case before us.

That a mistake in fact is a ground of repetition, is too clear and too well settled to require argument or authority in its support.

The misapprehension or ignorance of the parties to this suit related to a statute of the State of New York. Is this, in the present question, to be considered fact or law?

The existence of any foreign law must be proved by evidence showing what it is. And there is no legal presumption that the law of a foreign state is the same as it is here. 2 Stark. Ev. (Metcalf's Ed.) 568; Male *v.* Roberts.[1] If a foreign law is unwritten, it may be proved by parol evidence; but if written, it must be proved by documentary evidence. Kenny *v.* Clarkson;[2] Frith *v.* Sprague;[3] Consequa *v.* Willings.[4] The laws of other States in the union are in these respects foreign laws. Raynham *v.* Canton.[5]

The courts of this State are not presumed to know the laws of other States or foreign nations, nor can they take judicial cognizance of them, till they are legally proved before them. But when established by legal proof, they are to be construed by the same rules and to have the same effect upon all subjects coming within their operation, as the laws of this State.

That the *lex loci rei sitæ* must govern the descent of real estate, is a principle of our law with which every one is presumed to be acquainted. But what the *lex loci* is, the court can only learn from proof adduced before them. The parties knew, in fact, that the intestate died seised of estate situated in the State of New York. They must be presumed to know that the distribution of that estate must be governed by the laws of New York. But are they bound, on their peril, to know what the provisions of these laws are? If the judicial tribunals are not presumed to know, why should private citizens be? If they are to be made known to the court by proof, like other facts, why should not ignorance of them by private individuals have the same effect upon their acts as ignorance of other facts? *Juris ignorantia est, cum jus nostrum ignoramus*, and does not extend to foreign laws or the statutes of other States.

We are of opinion, that in relation to the question now before us, the

[1] 3 Esp. 163. [2] 1 Johns. 385. [3] 14 Mass. 455.
[4] Pet. C. C. 229. [5] 3 Pick. 293.

statute of New York is to be considered as a fact, the ignorance of which may be ground of repetition. And whether *ignorantia legis* furnishes a similar ground of repetition, either by the civil law, the law of England, or the law of this Commonwealth, it is not necessary for us to determine. The examination, comparison, and reconciliation of all the conflicting *dicta* and authorities on this much discussed question is a labor which we have neither leisure nor inclination to undertake.

In the view which we have taken of this case, it appears that the defendant received a part of the consideration for which the plaintiff's estate was sold; that it was received by mistake; and that this mistake was in a matter of fact. He therefore has in his hands money which *ex æquo et bono* he is bound to repay, and there is no principle of law which interposes to prevent the recovery of it out of his hands.

The action for money had and received, which for its equitable properties is ever viewed with favor, is the proper remedy for its repetition. The mode in which the payment was originally secured by bond and mortgage forms no objection to the recovery, inasmuch as the money was in fact paid before the action was commenced. The plaintiff's remedy will extend to all the money actually received by the defendant beyond his legal proportion of the estate. Whether it shall extend further, is a question involved in some difficulty.

The estate in New York, at the decease of the intestate, was under mortgage. This mortgage was satisfied from the estate itself, and the amount thus paid deducted from the consideration money. The plaintiff now contends that this incumbrance ought to have been removed by a payment from the personal estate, or if that was insufficient, from the real estate in this Commonwealth.

In the consideration of this question, it must not be forgotten that the plaintiff can recover only what in equity and good conscience is due to him. What descended to the heirs in New York? The estate there, not free from all incumbrances, but with this mortgage upon it. Did equity require that the defendant and his brothers should advance three-fourths of the money to pay off this mortgage, that the plaintiff might have one-half the estate increased in value by this payment?

The mortgagee relied entirely upon his lien on the estate; otherwise he would have demanded payment of the administratrix, and sought a remedy against her upon the personal security of the intestate. This he omitted to do until the claim was barred by the statute of 1791, c. 28. The only sure remedy then remaining was upon his mortgage. This remedy he resorted to, and obtained from the land mortgaged satisfaction of his debt, by a sale of part of it according to the laws of New York.

It is true that before this claim against the estate was barred by the statute of limitations, the heirs agreed with the administratrix that the debt should be paid out of the proceeds of a sale of certain corporate

stock. But the stock was not sold so as to make the payment, and after the demand was barred the heirs made an agreement with the purchaser of their estate in New York, that he should retain enough of the consideration which was then due to them to remove this incumbrance, deducting an equal amount from each bond. After the deduction of this amount from the bonds, the balances were paid to the obligees, and thus the bonds were satisfied and discharged. The effect of this arrangement by the heirs was, to leave the estate in the hands of the purchaser in the same situation it would have been had it been sold subject to this incumbrance.

It must be presumed that the heirs stipulated to remove the incumbrance or to furnish the purchaser with the means of doing it. If this was not the case, they voluntarily agreed to relinquish a part of the purchase-money. In this event it was equivalent to a reduction of the price of the estate, and the plaintiff can have no claim to any more than one-half of the price which was finally agreed upon and actually paid.

If the heirs agreed to pay off this mortgage, it was a part of the agreement that it should be paid out of a particular fund. As this agreement was made by the plaintiff under the mistaken supposition that he owned but a quarter, when in fact he owned half of it, he claims to be relieved from its operation. If the agreement is invalid in part, it must be so in the whole. The plaintiff cannot be released from it and the defendant be bound by it. If the plaintiff, with a knowledge of his rights, would not have agreed to pay out of this fund; so the other heirs, with the same knowledge, would not have agreed to pay at all. They would have relied upon their statute bar, and left the mortgagee to his remedy on the mortgaged estate and their grantee to his remedy against his grantors or in resisting payment of his bonds.

Although this agreement was founded in misapprehension, yet as it was made in good faith and has been executed, as the parties cannot be restored to the situation they were in when it was made, and as the effect of annulling it as to one would be manifest injustice to the other, we can see no good reason why both should not be bound by it.[1]

Upon a view of the whole case, it is the opinion of the court, that the plaintiff recover one-third of the whole amount received by the defendant on account of the sale of lands in New York, with interest from the service of the writ.

[1] A portion of the opinion not relating to the question of mistake has been omitted. — Ed.

JOHN CLAFLIN, Jr. *v.* WILLIAM GODFREY.

In the Supreme Judicial Court of Massachusetts, October Term, 1838.

[*Reported in* 21 *Pickering*, 1.]

Assumpsit to recover the sum of $1722.77, with interest from June 17, 1833.

The plaintiff proved, that on April 4, 1828, Stephen R. Parkhurst, Nathan Parkhurst, and Parmenas P. Parkhurst, copartners under the firm of Stephen R. Parkhurst & Co., made their promissory note to John Farnum, in the sum of $4500, and at the same time executed and delivered to him, as security for the note, a mortgage of real estate, by them owned, situate in Milford. The real estate was then subject to two mortgages, one to D. Waldo, to secure the payment of $200, the other to R. Waldo, to secure the payment of $1000.

On July 3, 1830, Stephen R. Parkhurst, in behalf of himself and Nathan and Parmenas, agreed with Farnum, in lieu of the note for $4500, to deliver to him, within six months, 4000 yards of satinet, and to give him security therefor; and in pursuance of this agreement Stephen procured Claflin, the plaintiff, to give his note to Farnum for the satinet. Farnum thereupon transferred to the plaintiff the note for $4500, by indorsing it without recourse to himself, and at the same time assigned to the plaintiff the mortgage given as collateral security for the note. Before the 5th of November then next, Parkhurst & Co. paid the note given by the plaintiff to Farnum, and afterwards, on or before that day, delivered the same to Godfrey, the defendant.

On the same 5th of November, Parkhurst & Co. and the defendant had a reference of various matters between them, the plaintiff being one of the arbitrators; and upon the hearing before the arbitrators it was ascertained and admitted, among other things, that the defendant was then liable as surety for Parkhurst & Co. to the Mendon Bank, for the sum of $4000, on a note made by Parkhurst & Co. as principals, and the defendant and one Ithiel Parkhurst as sureties; and that there was due to the defendant from Parkhurst & Co. the sum of $1801.06. The defendant had other claims against Parkhurst & Co., and was under other liabilities on their account, as security for which he held two mortgages.

At the hearing before the arbitrators, the defendant produced the note given by the plaintiff to Farnum, and it was stated by Stephen R. Parkhurst and the defendant, before the arbitrators, the plaintiff being present and hearing the statement, that the satinet with which Parkhurst & Co. had paid Farnum, was made of wool furnished by the defendant under a certain

contract, dated March 6, 1830, and that therefore the defendant was to have the benefit of the mortgage made to Farnum. Stephen then agreed with the defendant, that the note given by the plaintiff to Farnum should be given up by the defendant to the plaintiff, and that the note and mortgage for $4500, should be assigned by the plaintiff to the defendant, to be held by the defendant as further security on account of his claims and liabilities; and thereupon the plaintiff, upon receiving his note from the defendant, transferred to the defendant the note and mortgage for $4500, indorsing the note without recourse.

After the arbitrators had made their award, they were requested to apportion the several claims and liabilities of the defendant, upon and among the three mortgages held by him, and in compliance with such request they directed, that he should hold the Farnum mortgage to indemnify him against his liability as surety on the note for $4000 to the Mendon Bank, and as security for the payment of $756, part of the sum found due to him on account. He thereupon agreed to hold the Farnum mortgage for that purpose and no other, and gave a bond to Stephen to that effect. On November 12, 1831, the defendant transferred the note and mortgage for $4500, to the Mendon Bank, to be held by the bank as collateral security for the payment of the note of $4000, on which the defendant was a surety.

On November 12, 1831, Stephen, Nathan, and Parmenas again mortgaged the same real estate to William Whitney, to secure the payment of all such advances and claims as he might have against Parkhurst & Co.

In January, 1833, the right in equity of Stephen, Nathan, and Parmenas to redeem the same real estate was taken on an execution in favor of a creditor, and the plaintiff and Lee Claflin and the defendant agreed to become the joint purchasers, provided they could obtain it for a certain price; and on February 25, 1833, it was sold to them for $2000, and on the same day a deed thereof was duly made to them by the officer. Among the incumbrances on the estate, subject to which the equity of redemption was sold, the Farnum mortgage was mentioned by the officer, at the sale and in his deed. He also mentioned the Whitney mortgage, and stated that the amount due thereon was less than $2000. It was a part of the agreement between the plaintiff and defendant and Lee Claflin, that the Farnum mortgage should be relieved from the claim of the Mendon Bank, by the payment of the note for $4000, and that the assignment to the bank, which had not been recorded, should be cancelled, and that the defendant should convey one-third of the mortgage to the plaintiff and one-third to Lee Claflin.

Stephen R. Parkhurst, by conveyances from Nathan and Parmenas, had become the sole owner of the right to redeem from the sale on execution, and on March 6, 1833, in consideration of $300 paid him by the plaintiff, the defendant, and Lee Claflin, he quitclaimed to them all his right, title,

and interest in the estate, they agreeing to take up the note for $1000 to the Mendon Bank.

On June 17, 1833, the plaintiff and Lee Claflin each paid to the defendant one-third part of the amount due on the note for $4000, by giving with the defendant their joint and several note therefor to the bank, which note has since been paid by them in equal portions; and the plaintiff and Lee Claflin also paid each one-third part of the sum of $756, with interest thereon, by cash paid to the defendant; the third part of both sums amounting to $1722.77. The bank thereupon gave up the note for $4000, and the note for $4500, and cancelled the deed of assignment made by the defendant to the bank, of the Farnum mortgage, intending thereby to revest in the defendant whatever estate he had at the time of making the assignment, so as to enable him to assign to the plaintiff and Lee Claflin, in the manner before mentioned.

On the same 17th of June, the defendant, in consideration of the sum of $3454.54 so paid by the plaintiff and Lee Claflin, by his deed of that date transferred to them two-third parts of the Farnum mortgage, and two-third parts of the note for $4500 thereby secured.

Stephen, Nathan, and Parmenas Parkhurst had all become insolvent before the same 17th of June, and are still insolvent.

The plaintiff proved, that after the conveyance by the defendant to the plaintiff and Lee Claflin, Whitney, in a bill in equity between him and the present plaintiff and Lee Claflin, resisted the note and mortgage for $4500, on account of the payment made by Parkhurst & Co. to Farnum, and thereby defeated the same. The claim of Whitney under his mortgage turned out to be more than $10,000, instead of being less than $2000, as stated by the officer at the sale of the equity of redemption.

After Whitney had so defeated the note and mortgage for $4500, the plaintiff brought his present action to recover the sum of $1722.77 paid by him therefor to the defendant.

Judgment was to be entered on a nonsuit or default, according to the opinion of the court upon the foregoing facts.

Newton and *Merrick*, for the plaintiff.

C. Allen and *Washburn*, for the defendant.

The opinion of the court (SHAW, C. J., and DEWEY, J., dissenting),[1] was delivered by

MORTON, J. We have bestowed unusual labor and care upon this case, and with our best efforts have found some difficulty in understanding the very complicated state of the facts, and still more in applying to them the principles of law by which the rights of the parties should be determined.

[1] The dissenting opinion of Mr. Chief Justice SHAW, in which Mr. Justice DEWEY concurred, has been omitted. The dissent arose more from a difference of opinion as to the facts established by the evidence than from a difference of opinion as to the rules of law applicable to such facts. — ED.

We have the more carefully investigated the subject, because there has been from the beginning a difference of opinion among the members of the court. And I regret to add, that with our most earnest endeavors we have not been able to unite in the result which I am now about to announce.

The action is assumpsit for money had and received by the defendant to the plaintiff's use, and for money paid by the plaintiff for the defendant's benefit. This is often called an equitable action, and is less restricted and fettered by technical rules and formalities than any other form of action. It aims at the abstract justice of the case, and looks solely to the inquiry, whether the defendant holds money, which *ex æquo et bono* belongs to the plaintiff. It was encouraged and, to a great extent, brought into use by that great and just judge, Lord Mansfield, and from his day to the present has been constantly resorted to in all cases coming within its broad principles. It approaches nearer to a bill in equity than any other common-law action; and indeed has many of the advantages, without the artificial formalities and dilatory proceedings, of a chancery suit. Moses *v.* Macferlan;[1] Straton *v.* Rastall;[2] Roland *v.* Hall;[3] Parry *v.* Roberts.[4]

The plaintiff's claim grows out of a transaction in which all the parties concerned were involved in a series of gross mistakes and errors, which brought upon them great pecuniary suffering. The object of the present suit is to determine, as far as practicable, upon whom the losses shall fall, and how they shall be apportioned. The mistakes were accidental, and there is no reason to suppose that any misrepresentation or deception was attempted or practised by either party.

We have therefore to determine who of the innocent sufferers shall sustain a particular loss growing out of the misfortunes of a joint speculation.

It will be impossible to discuss this question without adverting to and examining the claims of a person who is not a party to the suit, who has not been heard, and who therefore cannot be bound by our judgment. Lee Claflin has upon the docket an action founded upon the same transaction, and which probably will depend upon the same facts and principles as the case at bar. We cannot therefore proceed in the investigation without canvassing the claims, liabilities and rights of all the persons engaged in the disastrous speculation.

Early in the year 1833, the right in equity of redeeming certain real estate in Milford was advertised for sale on execution. John Claflin, the plaintiff, Lee Claflin, and William Godfrey, the defendant, agreed to become the joint purchasers, provided they could obtain it for a price which they had agreed upon. Accordingly, on February 25, 1833, they bid off the equity for the sum of $2000, which was paid equally by the three, and took a joint deed of the whole. At the auction the officer represented

[1] 2 Burr. 1012. [2] 2 T. R. 370. [3] 1 Hodg. 111; s. c. 1 Scott, 539.
[4] 3 A. & E. 118; s. c. 5 Nev. & M. 663; 1 Leigh's N. P. 44.

that the incumbrances to which the estate was subject consisted of two mortgages to D. and R. Waldo, one originally given to John Farnum, and one to W. Whitney, upon which less than $2000 were due. But it was afterwards discovered that, instead of $2000, over $10,000 were due upon the Whitney mortgage. This amount, with the Waldo mortgages, greatly exceeded the value of the estate, so that it became inexpedient to redeem it, and the purchasers lost the whole consideration paid for the equity of redemption. There can be no doubt that, by the principles of law and equity, this loss must fall equally upon the parties. But this was only the beginning of the errors and losses into which this unfortunate transaction led them.

In 1828, Stephen R. Parkhurst & Co., who were the owners of the real estate aforesaid, mortgaged it to John Farnum to secure the payment of $4500. Farnum assigned the mortgage to John Claflin, the plaintiff, to secure him for his liability to Farnum as the surety of Parkhurst & Co. Afterwards John Claflin, having been relieved from his suretyship, at the joint request of Godfrey and Parkhurst & Co., and without receiving any consideration from either, assigned the mortgage to Godfrey. This assignment was procured by Parkhurst & Co. to secure Godfrey for his liability for them to the Mendon Bank, on a note of $4000. Godfrey again assigned the mortgage to the bank as collateral security for the above note, which he had signed as surety.

In this state was this mortgage, when the Claflins and Godfrey agreed to purchase the equity of redemption. It was a part of their agreement, that this mortgage should be relieved from the claim of the Mendon Bank by the payment of the note for which it was holden as collateral security; and that the assignment to the bank, which never had been recorded, should be cancelled; and that Godfrey, who would thus be restored to his rights as holder of the mortgage, should convey to each of the Claflins one-third of it, so that the three should become equally interested in it.

In pursuance of this agreement, "on the 17th of June, 1833, the Claflins each paid to Godfrey one-third of the amount due" to the bank, and the whole being paid the note was taken up and delivered to Godfrey, and the assignment to the bank cancelled. The mortgage having, as the parties supposed, revested in Godfrey, he made an assignment of two-thirds of it to the Claflins, thereby vesting in each of the three an equal interest in the mortgage.

The payment to the bank was made, in the first instance, by three equal notes, for the amount, given jointly and severally by the three parties. When these notes became due, each party paid one of them. So that the payment is not to be deemed a joint act of the three, but a several payment by each of one-third of the amount. And the three notes should be considered as the several notes of the parties, two, in each case, being sureties for the other.

Soon after this transaction, it was ascertained, and decided by this court, in a bill in equity between Whitney and their assignees, that the payment to Farnum of the debt which the mortgage was originally made to secure, operated in law as a discharge of the mortgage, which thereby became *functus officio*. So that all the subsequent formal transfers were inoperative, and passed nothing.

The conveyance by Godfrey to the Claflins having entirely failed, it would seem that they ought to recover back the consideration which they paid. They parted with their money, for what all parties, at the time, supposed to exist and have value. But it proved to be valueless; to be, in fact, a nonentity. Godfrey parted with nothing of any value. He received the money of the Claflins, and the plainest principles of justice require that he should restore that which he received without having given anything in return. Fowler *v.* Sheaver;[1] Bond *v.* Hays;[2] Lazell *v.* Miller;[3] The Union Bank *v.* Bank of United States;[4] Haven *v.* Foster.[5]

The general principle, that when the whole consideration fails, when the title is entirely nugatory so that nothing passes by the conveyance, the purchase-money may be recovered back, is unquestioned. And if no other ingredients entered into this arrangement between the parties, the plaintiff's right to a repetition of his money would be too plain to admit of doubt.

The report finds, in express words, that the Claflins paid Godfrey two-thirds of the amount due to the bank. The manner in which it was done is then explained, and it is argued that it does not show a payment to Godfrey, but to the bank. It seems to us, that inasmuch as Godfrey was the person liable to the bank, — as he was to receive back the mortgage, — and he, and not the bank, was to assign it to the Claflins, the transaction should be viewed in the light of a payment to Godfrey and by him to the bank. But we do not attach great importance to this view of the subject. For we think that the plaintiff's claim is equally good, whether we consider the payment to have been made to Godfrey or, by his request, to the bank, in satisfaction of his note due there. It, in both cases, would operate equally for his benefit.

But it is further contended with plausibility, if not force, that it was part of the original agreement between the parties, that they should not only purchase the equity of redemption, but also should buy in this outstanding mortgage, and therefore that the three parties, being equally innocent and having equal means of knowledge, must bear the loss equally. Had all the facts been as stated, and had the mortgage been in the hands of a third person, instead of one of the purchasers, the loss, if any were sustained, should, like the loss on the purchase of the equity, fall equally upon all. But it may be said in reply, and we think it unanswerable, that had the mortgage been in other hands upon the failure of the assignment,

[1] 7 Mass. 31. [2] 12 Mass. 34. [3] 15 Mass. 207. [4] 3 Mass. 74.
[5] 9 Pick. 112.

the money might have been recovered back. Why should the Claflins be placed in a worse condition than if they had purchased the mortgage of a third person? Can the defendant have any greater rights against the plaintiff, than a stranger would have? We think not.

Nor can we perceive that the relation which the defendant bears to the bank debt, affects the respective rights of the parties. It is true Godfrey had signed the note only as surety. It was for the debt of Parkhurst & Co.; but he was bound to pay the debt. And it can make no difference to the Claflins, whether he had incurred this liability on his own account or for another.

But it is further contended, that the Claflins and Godfrey contracted with Stephen R. Parkhurst to purchase in his right to redeem from the sale of the equity as well as from the mortgages, and that a part of the consideration of this purchase was the agreement to pay the above note to the Mendon Bank; that the conveyance having been made upon this consideration, Godfrey was deprived of his remedy over against his principals, and also against his co-surety for contribution. This objection certainly has great weight and constitutes the principal difficulty in the case. But we think it is not insuperable.

The facts in relation to this point appear to be the following. The Claflins and Godfrey, after the purchase of the equity of redemption at the sheriff's sale, in pursuance of their original plan to become the owners of the Milford estate, and to perfect their title to it agreed to purchase of Parkhurst all his right to redeem the estate, and accordingly completed a contract with him to that effect. To induce Parkhurst to convey the right of redemption, which remained to him, the Claflins and Godfrey agreed to pay him $300 and to take up the note at the Mendon Bank. In execution of this agreement Parkhurst, on the 6th of March, 1833, made a deed of quitclaim to the Claflins and Godfrey, who at the same time paid him the $300, and afterwards, in the manner above stated, took up the Mendon Bank note.

We do not doubt that the real consideration of the release of the equity was the payment of the note as well as the cash. As to the money paid, there can be no ground for contribution. It was a payment upon a joint speculation, and if it turned out to be a bad one, the loss must be borne equally by the parties. If they have any remedy, it must be against Parkhurst, to recover back money paid to him under a mistake; but neither can have a right to throw upon his associates an undue proportion of the common loss.

Does the payment to the Mendon Bank stand on the same footing? If the parties, without misapprehension and with a knowledge of all the facts, had made this contract, although in its operation it had relieved Godfrey at the expense of the Claflins, it would unquestionably have been valid and have laid no foundation for a repetition of the money paid, nor for a con-

tribution between the sufferers. It would have stood upon the same ground as the contract with Parkhurst, and the purchase at the sheriff's sale. If this agreement with Parkhurst to pay the bank debt was an obligatory one, it would discharge the Parkhursts from their liability over to Godfrey. And if Godfrey was deprived of his right to recover of his principals and co-surety, it would be very unjust to throw upon him the loss incurred by the joint acts of the three, and to relieve the other two of their share of the common responsibility.

Nor is the circumstance that the Parkhursts were and are entirely insolvent, any answer to this view of the subject. It cannot be known that they will not become able to reimburse Godfrey. But further, the legal rights and liabilities of parties do not depend upon their pecuniary ability to perform their contracts. And if this arrangement operated so as to deprive Godfrey of his remedy against his principals and co-surety, then we can see no good reason why the whole amount paid to the bank should be thrown upon him, rather than divided between the parties.

But a majority of the court is of opinion that such was not the legal effect of this transaction. All the parties acted under a total misapprehension of all the material facts in the case, as well as of their own legal rights and liabilities. No fraud enters into our consideration; everything was perfectly fair; but all the persons concerned in the several contracts were equally misinformed and acted under the same errors in relation to the principal subjects of the negotiations.

In making the contract to purchase the last right of redemption, the Claflins and Godfrey on the one side, and the Parkhursts on the other, fully believed and acted on the conviction that Whitney's incumbrance was less than $2000, whereas it exceeded $10,000; and what is more important, that the Farnum mortgage was a valid lien upon the estate, taking precedence of Whitney's mortgage, and being certainly worth its face, whereas, in fact, it had no legal existence and had no value. Now had these facts been known to the parties at the time, they never would have made the contracts they did. It is impossible to suppose that the Claflins would have agreed to pay several thousand dollars for what they knew had no validity or value and could in no event be of any avail to them.

The whole basis of the contracts having failed, the contracts themselves must fall, and the parties, as far as practicable, be placed in *statu quo*. They should be remitted, as far as the existing state of things will permit, to all their former rights. The purchasers of the last right of redemption may recover back the money paid for it. Godfrey may have the same remedy against his principals and co-surety which he might have had if he had made no agreement for the purchase of the equity. And the Claflins should be placed in the same situation they would have been in had they never become parties to the agreement. Had Godfrey alone purchased the equity of the sheriff, made the contract with the Parkhursts, and paid the

Mendon Bank note, as the three have done, we think it extremely clear that the mutual misapprehensions would have avoided the contract, and that he would have been restored to all his rights against the Parkhursts and other parties to the transaction.

Had the Farnum mortgage been holden by a stranger instead of Godfrey and the contract been with him for the assignment of it, the consideration undoubtedly might have been recovered back. It would have been like the purchase of a forged mortgage or counterfeit bank bills. There would have been an entire failure of the contract. Or had the Claflins made a contract with the bank for the purchase of two-thirds of the mortgage and had the bank assigned to them, we cannot doubt that they might have recovered back the consideration which they paid for it. And we can perceive no reason why the principle should not apply to the case at bar, unless the arrangement under consideration operated as a discharge of the Parkhursts from their liability over to Godfrey. This we have endeavored to show was not the case. If Godfrey intended to discharge the Parkhursts, or if he supposed that such would be the legal effect of these acts, it was because he believed that he received something of value from them. But inasmuch as he received nothing, no discharge can be implied, nor is there any consideration which would support an express one.

It was undoubtedly the clear understanding of all the parties, that the plaintiff should receive and become the legal owner of one-third of the Farnum mortgage. This was the consideration for which he paid his money. But contrary to the honest belief of all, this proved to be a legal nullity. The plaintiff acquired nothing. He paid his money and for it received nothing in return. Upon the plainest principles of right, therefore, the consideration should be restored to him. Nor would this operate unjustly upon the defendant. He supposed that he had something of value, and undertook to transfer it to the plaintiff. But it turned out that it had no legal existence, and that he had transferred nothing. Having, by misapprehension, got something without parting with anything, why should he not restore? He not only conveyed nothing, but he lost nothing. If he restores what he received, he will be in as good a situation as if he never had received it. He has paid, with the aid of the Claflins, a debt which he would have been obliged to pay himself, had they not interfered. He has now the same means of indemnity against others which he would have had in that case. Let the Claflins recover back the money which they paid, and it will be the nearest practicable approximation to a restoration of the parties to their original rights.

It cannot properly be objected to this view of the case, that the parties contracted with a full knowledge of all the facts, and that the mistakes arose altogether from a misapprehension of the law. We shall not here enter into a discussion of the vexed question, whether money paid by mistake of law can be recovered back, because we do not think that the doctrine,

if sound, applies. See Haven *v.* Foster.[1] Here was a total misapprehension of everything material to the subject of negotiation. The plaintiff strives to reclaim the consideration of a contract which never had any legal force or effect. The general principle is well settled, that when the consideration totally fails, where nothing passes by the attempted transfer or conveyance, the amount paid may be recovered back. And the application of the principle does not at all depend upon the question, whether the failure arose from ignorance of law or of fact.

In relation to the payment to Godfrey of one-third of the amount due from the Parkhursts to him, all the court are of opinion that the plaintiff is entitled to recover. This was not included in the agreement with the Parkhursts. It was a part of the consideration paid by the plaintiff for his part of the Farnum mortgage. And as he received nothing for the money paid, and as the transaction can have no unfavorable effect upon Godfrey's claim upon his debtors, we think that he must recover this sum. And notwithstanding the many circumstances which tend to distinguish the two grounds of claim, a majority of us are of opinion, that when thoroughly sifted and placed upon their true merits, they both rest upon the same equitable basis, and are alike compatible with sound principles of law.

There is also another short and general view of the subject, which we think fairly and clearly exhibits the substantial justice of the plaintiff's claim.

The two Claflins and Godfrey engaged in a joint enterprise, in which they were equally interested. Had it proved fortunate, they would have shared equally in its advantages. It proved disastrous. Common justice therefore required that they should bear equally the common misfortune. But unless the plaintiff may recover in this action, the Claflins would not only sustain the whole loss, but Godfrey would actually be enriched, by a speculation which caused a great loss to the common concern. Godfrey had a debt due to himself, and also owed a debt as surety to the Mendon Bank, two-thirds of both of which the Claflins have paid. As the Parkhursts were insolvent, the former would have remained unpaid and the latter must have been paid by Godfrey. Now unless he be holden to repay to the Claflins the amount paid by them to him, he will make a clear profit of the money thus received, deducting only the amount which he paid for the two equities; while the two Claflins will not only lose the sums paid for the equities, but also the amount paid to Godfrey. This cannot be equal justice. But if Godfrey repay to the Claflins the amount received of them, then he will be in the same situation he would have been in had the Claflins paid him nothing. He will have his claim against the Parkhursts for their debt due to him, and for the money he has been obliged to pay for them by reason of having become their surety.

The defendant is to be defaulted and judgment is to be entered for the plaintiff for both sums, with interest from the time of payment.

Defendant defaulted.

[1] 9 Pick. 112.

RAY AND THORNTON *v.* THE BANK OF KENTUCKY.

IN THE COURT OF APPEALS OF KENTUCKY, MAY 31, 1843.

[*Reported in* 3 *B. Monroe*, 510.]

THIS is an action of assumpsit, brought by Ray and Thornton, to recover back money paid to the Bank of Kentucky, at their branch at Greensburg, on a bill of exchange. Ray and Thornton, citizens of Lebanon, Ky., and traders to the South, had procured from Saunders, a wealthy gentleman of Woodville, Mississippi, as drawer, a bill of exchange, drawn in their favor and accepted by Throckmorton of New Orleans, for $1193.58, dated the 18th of February, 1840, payable on the 1st of November next thereafter; and having procured the names of their friends at Lebanon, David Philips, S. Spaulding & Co., and Floyd and Ray as accommodation indorsers on the bill, in July, sold, indorsed, and delivered the same to the Bank of Kentucky, at their branch at Greensburg. The bill was started, by mail, to New Orleans, by the cashier of the branch bank, on the 24th day of October, and did not arrive till the 12th of November, on which day it was protested for non-payment, and notices immediately inclosed, by the mail, to the cashier, and by him inclosed to the indorsers at Lebanon. It appears that Ray and Thornton were absent in the South when the notices arrived; that the plaintiff's indorsers being uneasy and apprehending difficulty as to the effect that the protest might have upon their credit, and one of them having an accommodation in the branch bank of three thousand dollars, Finley, Ray's partner in a mercantile firm, went immediately down to Greensburg, at the request of the indorsers, as well to see about the bill as to renew a note of $1000 which he and Ray had in bank, and which they had been promised the privilege of renewing when it was discounted; that the directors hesitated to permit a renewal on account of Ray's being under protest on the bill, and consented to permit its renewal only on the payment of $500 down, and his assurance that Ray would come down and take up the bill immediately on his return from the South. Finley did not see the protest, nor did he doubt that Ray and Thornton were liable for the bill. He knew nothing about bills of exchange, and it was proved that Ray, though he had been a merchant for about twenty years, knew very little about such paper, the witness stating that he had never known him to have anything to do with but one other bill of exchange before.

Ray returned in February, 1841, and went immediately down to Greensburg and paid and lifted the bill. It is proven by the cashier that Ray, before he paid the bill, knew that it had not been protested till the 12th of November, and that it had matured on the 1st and 4th, and expressed regret and fears that he might sustain loss on account of the bill not having

reached New Orleans in time. The cashier also stated that he did not know or believe that the indorsers were released, nor did the directors, as he believed. It was also proved by the postmaster at Louisville, that according to the regulations of the mail at the time the bill was transmitted, letters mailed at Greensburg for the South had to pass through Louisville, and a letter mailed on the 24th October could not reach New Orleans by the 4th of November. It is further proved that a young man who was in the employment of Messrs. Henderson & Franklin, of New Orleans, had been furnished by them with funds to pay the bill, and he inquired at every bank in the city and of the proper officers of the bank, on the 4th of November, when said bill matured, for it, and would have paid it, but it had not arrived or he could not find it. He instructed the officers of the bank that when it arrived Henderson & Franklin would pay it; but when it arrived, on the 12th, it was not paid, the funds perhaps having been applied to other objects. It appears also that Throckmorton, shortly after the maturity of the bill, failed and died wholly insolvent, about the time the bill was paid to the bank.

That Ray and Thornton, and all the other indorsers were legally released and discharged from all responsibility upon the bill, is unquestionable. And so also was Saunders, the drawer, unless it appeared that he had made no provision for the payment of the bill, nor had any funds for its payment in the hands of the acceptor; the contrary of which is always presumed in the absence of proof establishing a want of funds.[1]

That Ray knew that he and they were discharged when he paid and lifted the bill, does not appear; but the presumption may be fairly indulged that he did not know or believe it. It is certain that the fact of his discharge was not communicated to him by the officers of the bank; and as they did not know that the indorsers were discharged, as is proven by their cashier, whose business it was to deal in such paper, the presumption may be indulged that Ray, who knew but little about such paper, did not know it. And though it is proven that he knew that the bill had not reached New Orleans in time, it does not appear that he knew, or that the fact was communicated to him, that the bill had not been mailed for that place until the 24th of October, and that, mailed at that time, it could not reach New Orleans until after its maturity. Nor does it appear that he knew, when he paid the bill, that had it arrived in time the funds were ready to pay it off, and that it would have been paid, and he and all the indorsers discharged from further liability.

Upon the facts proven, the Circuit Court, at the instance of the counsel for the bank, instructed the jury, that upon the whole evidence the plaintiffs could not recover, and the jury having found accordingly, and a judgment rendered on their verdict, the plaintiffs have appealed to this court.

[1] Chitty on Bills, 198.

We are clearly of opinion that the court erred in the instruction given. The instruction is in the nature of a demurrer to the evidence, and should not have been given unless from the facts proven, and every reasonable inference that might be deduced from them, favorable to the plaintiffs, by a jury, they could not have found for the plaintiffs. Giving to the evidence this favorable interpretation, we think that it may be assumed as proven, that Ray, when he made the payment, was ignorant of the law by which he was discharged; ignorant of the laches of the officers of the bank, in not starting the bill in time; and ignorant of the fact that funds were prepared, and had the bill arrived in proper time it would have been paid off, and that in consequence of the negligence of the bank only, in failing to forward the bill in time, it was not paid, and the responsibility was thrown upon him, and his recourse upon the drawer lost; that in ignorance of his legal exoneration, as well as of the facts stated, he paid the bill. Upon these facts and conclusions, which the jury might have fairly deduced from the evidence in the cause, we think that it was not only their right but their duty to find for the plaintiffs.

It has long been a controverted question, whether a party could avail himself of his mistake or ignorance of the law merely, as a ground to exonerate himself from his civil obligation or to rescind an executed contract or recover back money paid. Able authorities, in England and in the American States, may be found upon both sides of the question. This court took occasion to examine many of those authorities, in the case of Underwood *v.* Brockman.[1] And in this case we have not only reviewed the authorities there referred to, but have examined many others in the English courts, as well as in the courts of the States of this Union. We will not stop here to refer to those authorities, but will refer to two able numbers in the American Jurist, vol. 23, pages 143, 371, in which all the authorities upon both sides of this question are collected and compared, and the affirmative of the question maintained with distinguished ability. The review which we have made has confirmed us in the opinion that the principle settled in the case of Underwood *v.* Brockman is correct, and ought to be sustained. We admit that there may be a difference between executory and executed contracts; between the promise to pay and the payment of money; or rather, that it would require a more palpable case of mistake of law or of fact to rescind an executed contract or to recover back money paid, than to resist the payment or enforcement of performance of an executory contract. The parties change sides in the controversy, and he who would be defendant in an executory contract becomes plaintiff or complainant in the action to rescind or recover back money paid, and the maxim, "the better is the condition of the defendant," changes its operation on the parties. But the principle is the same in both classes of cases, the difference is in the degree or force of evidence necessary to make out or sustain the case.

[1] 4 Dana, 309.

Upon the whole we would remark that whenever, by a clear and palpable mistake of law or fact essentially bearing upon and affecting the contract, money has been paid without cause or consideration, which in law, honor, or conscience was not due and payable, and which in honor or good conscience ought not to be retained, it was and ought to be recovered back.[1] If this principle be applied to the facts in this case we cannot doubt that the plaintiffs should recover. We cannot doubt, indulging in a reasonable deduction from the testimony, that Ray was not only ignorant of his legal discharge, but was ignorant and unapprized of material facts, which had he known, might have entirely changed his determination to pay, as they did in fact exonerate him from all the obligations of morality or honor to make payment. He might, as an honorable and fair man, have felt willing to waive any technical objection to the non-arrival of the bill, had the bank done its duty in starting it in time, and especially when he was unapprized of the fact that had it arrived in time it would have been paid, yet not feel under any obligation in honor, in conscience, or morality, to pay the bill, had he known that its non-payment and its entire loss had been produced by the gross negligence of the bank, and not by any casualty on the way. Nor can it be presumed that, had he known these facts, and been also apprized of his and his indorsers' legal exoneration, he would have made payment. To indulge in such a presumption would be to presume that he would without cause or consideration take upon his firm, voluntarily, a burthen visited upon them by the laches of the bank, which legally rested upon the institution, and should in good conscience and morality be borne by it. Nor can the bank in good conscience, morality, or honor, retain the money; it has lost the amount of the bill by the negligence of its officers, and has received from Ray the amount, in ignorance of his rights, and in ignorance of facts which releases him from all moral obligation to pay it. Should they not refund the amount and bear the loss produced entirely by their own negligence? Moreover, he had a right to expect that the bank, whose business it was to deal in such paper, had done its duty, and would not set up claim for payment from the indorsers if they were not liable. Under this conviction and the pressure of his accommodation indorsers, who, no doubt, believed also that they were all liable, he hastened down to the bank immediately upon his return from the South, and had no opportunity to inquire fully into the facts, or to take counsel as to his legal liability, and relying upon the claim of the bank as just, and as evidence of their right to demand payment, might not have conceived it necessary to do so, being thrown off his guard by his confidence in its officers and their unequivocal assertion of right.

But it is said that he and his friends who were his indorsers, had accommodations in bank, and might look for others, of which they might fear they would be deprived if the bill was not paid, and this may have furnished

[1] City of Louisville *v.* Henning, 1 Bush, *accord.* — Ed.

a motive to pay. So far from such considerations operating in favor of the bank's conscientious right to retain, it furnishes an additional reason on the side of their obligation to refund.

If Ray acted under the pressure of such extraneous influences, he did not act freely, but under a kind of moral duress, of which the bank taking the advantage had exacted from him money which was his own, and which he had a right to retain, and should, therefore, be deemed under a stronger moral obligation to refund.

Upon the whole we are perfectly satisfied that the instruction was erroneous and the judgment should be reversed. It is, therefore, the opinion of the court that the judgment be reversed and cause remanded, that a new trial may be granted, and that the appellants pay the costs of this court.

Pirtle for plaintiffs; *Guthrie* for defendants.

NORTHROP'S EXECUTORS *v.* GRAVES.

In the Supreme Court of Errors of Connecticut, June, 1849.

[*Reported in* 19 *Connecticut Reports*, 548.]

This was an action of *indebitatus assumpsit* for money had and received, tried on the general issue at Danbury, October term, 1848.

The plaintiffs are the executors of the last will of David Northrop, late of Sherman, deceased. He died in April, 1832; and his will was duly proved and approved. Sally Graves is the wife of the defendant, and is still living.

The plaintiffs, in support of their claim, offered in evidence: —

1. The will of David Northrop, containing the clause recited in 18 Conn. R. 333.

2. The depositions of Sylvanus Merwin, Flora A. Merwin, and Orrin Stevens. The former testified that in the spring of 1842, he, with his wife, went to the dwelling-house of the defendant in Sherman; that the defendant soon afterwards spoke of the plaintiffs' having been there that day; said that they had paid 500 dollars on the will of their father; that he had given no receipt for the money himself, but that Mrs. Graves had given one; that by the will it was to go to the sons, and the plaintiffs would have it to pay over again to them; that they could sue the plaintiffs and recover it, but the plaintiffs could not get the money back paid to Mrs. Graves, as he had not receipted it himself; that the deponent was acquainted with the handwriting of Mrs. Graves, and the signature to said receipt was genuine. Mrs. F. A. Merwin corroborated the testimony of her husband.

3. The testimony of Jonathan O. Page, stating that in March, 1842, he held in his hands for collection a note against the defendant, and called on him for payment thereof, who at first declined paying it, on the ground that

he had no money on hand; but in a day or two afterwards, the defendant told the witness he would pay the note, saying "we have had some money very unexpectedly come in; that the plaintiffs had been there, and paid Mrs. Graves $500 for her legacy, bequeathed by the will of her father to her; but it was not according to the will, and they would have to pay it over again, as the money was not coming to her unless the defendant died within ten years from the death of the testator, but was to go to her children."

4. The testimony of Abraham Briggs, who testified that in the summer of 1843, he was on a visit to the defendant's house, when the defendant said to him that the plaintiffs [naming them] had paid to his wife $500 on a legacy given to her in her father's will; but that it was not due to her, but to his children, and he was going to sue for it.

5. The receipt of Mrs. Sally Graves, the body of which was in the handwriting of one of the plaintiffs, and was as follows: "Received, Sherman, April 7th, 1842, of David and John O. Northrop, executors of the last will of David Northrop, late of Sherman, deceased, $500, in full of a legacy bequeathed by said deceased, in said will, to his daughter, Sally Graves, wife of Jedediah Graves; which legacy was to be paid to said Sally Graves by the executors of said will, in ten years after his, the said David Northrop's decease. [Signed.] Sally Graves, wife of Jedediah Graves."

6. A letter, signed by the defendant, addressed to the plaintiffs, dated Dec. 8, 1843, demanding the amount of said legacy, and informing the plaintiffs that he should be in Sherman the then next week, and in case the plaintiffs should not pay said legacy at that time, he must and should proceed to collect the same as the law directs.

7. The testimony of Revilo Fuller and David D. Hoag, proving a demand made by the plaintiffs, in August or September, 1846, of the defendant, for the repayment of the $500, which they had paid to his wife on the legacy given to her by the will of her father.

To the whole of the evidence thus offered by the plaintiffs, the defendant objected, on the ground that it did not conduce to prove that the money in question was paid by the plaintiffs to Mrs. Graves, under any mistake or misapprehension of any facts; but if it conduced to show a mistake of the plaintiffs at all, it was a mistake of the law only; and also, that it did not conduce to prove that the defendant had received any money of the plaintiffs. The court overruled the objection and admitted the evidence.

The defendant then introduced the testimony of his sons, Edward Graves and George Graves, detailing the circumstances under which the money was paid to Mrs. Graves, and stating that it was mostly laid out by her in furniture, but not directly contradicting any evidence introduced by the plaintiffs.

Upon all the evidence in the cause, the plaintiffs claimed that they, as executors of the will of David Northrop, deceased, and from his estate, had

paid said legacy of $500 to Mrs. Graves, supposing it to be then due and payable to her under the will, and under a misapprehension of the terms and directions of the will; and they prayed the court to charge the jury, —

1. That if the money was paid by the plaintiffs, as executors, to apply on the legacy of Mrs. Graves, by reason of their forgetfulness and misapprehension of the terms of the will, this was a mistake in fact, and the money thus paid might be recovered back.

2. That if the plaintiffs, as such executors, paid the legacy, and as they supposed to carry into effect the directions of the will, though the payment was made by reason of a mistaken construction of the legal import of the will; and if the jury, from the evidence before them, believed that the defendant had no moral or conscientious right to retain the money, the plaintiffs were entitled to recover.

3. That if the legacy was so paid by the plaintiffs, under a mistake of their legal obligations and duty, as executors; and if the money was paid by the plaintiffs and received by the wife of the defendant, with his knowledge and consent, he knowing of the mistake of the plaintiffs in paying the money; and if he remained silent, without informing the plaintiffs of their mistake; and if the jury believed that the defendant had no moral or conscientious right to retain the money, the plaintiffs had a right to recover.

4. That if the plaintiffs were entitled to recover, they were entitled to recover the sum of $500, together with interest from the time the money was paid.

To such a charge the defendant objected, and claimed that if the plaintiffs paid the legacy to Mrs. Graves, as proved, yet, that it was not paid under any mistake, or misapprehension, or forgetfulness of facts; but if under any mistake at all, a mistake of the law alone, and if so, that the plaintiffs could not recover. He also claimed that from the facts proved, the plaintiffs had not sustained their declaration, and that the defendant, from such facts, was not liable in this action: he therefore prayed the court to charge the jury in conformity with his views.

The court charged the jury as claimed by the plaintiffs; and thereupon the jury returned a verdict in their favor for $695. The defendant thereupon moved for a new trial, for a misdirection.

Dutton and *H. G. Graves* for the defendant.

Hawley for the plaintiffs.

CHURCH, C. J. In deciding this case we have not supposed it necessary to examine very critically the opinions of jurists, which have been advanced upon the general question, how far mistakes of law may be relieved against in equity; nor what is the precise nature of the distinction made by courts between the effect of mistakes of law and mistakes of fact upon the rights and responsibilities of parties. The questions raised on this motion seem to us to be within limits more confined. And yet we shall have occasion to advert to some of the cases on this subject, and to some of the maxims

which are supposed to apply to it; such as *Volenti non fit injuria, Ignorantia legis non excusat;* and to the maxim often in requisition, and generally false in reality, that every man is bound, and therefore "presumed to know the law."[1] These and all other general doctrines and aphorisms, when properly applied to facts and in furtherance of justice, should be carefully regarded; but the danger is that they are often pressed into the service of injustice, by a misapplication of their true meaning. It is better to yield to the force of truth and conscience than to any reverence for maxims.

In the present case we establish no new principle, nor depart from any well-settled doctrine of the common law. *We do not decide that money paid by a mere mistake in point of law can be recovered back;* as if it has been paid by an infant, by a feme covert, or by a person after the statute of limitations has barred an action, or when any other merely legal defence existed against a claim for the money so paid, and which might be honestly retained. But we mean distinctly to assert that when money is paid by one under a mistake of his rights and his duty, and which he was under no legal or moral obligation to pay, and which the recipient has no right in good conscience to retain, it may be recovered back in an action of *indebitatus assumpsit*, whether such mistake be one of fact or of law; and this we insist may be done, both upon the principle of Christian morals and the common law. And such only was the doctrine of the charge to the jury in the present case. In such a case as we have stated, there can be no reasonable presumption that a gratuity is intended; nor is the maxim *Volenti non fit injuria* at all invaded. *The mind no more assents to the payment made under a mistake of the law* than if made under a mistake of the facts; the delusion is the same in both cases; in both alike the mind is influenced by false motives.

Nor are we here deciding a case where the plaintiffs claim to recover under a mere pretence that they were ignorant of the law, so much and so strangely feared by Judge Story;[2] but a case in which the jury has found that such mistake existed in truth, not in pretence.

Nor is this a case where the parties have made a compromise of a claim, in view of a legal doubt or uncertainty as to an asserted right, and have taken their chances of the result; but a case in which the plaintiffs verily supposed they were bound to pay, and the defendant, at the same time, knew they were not; and a case where the money in good conscience as much belongs to the plaintiffs now as it did when they had it in possession; as the jury, by their verdict, have found. One would think that a reference to adjudged cases could not be necessary to establish a principle of

[1] There is no presumption in this country that every person knows the law; it would be contrary to common sense and reason if it were so. . . . The rule is that ignorance of law shall not excuse a man, or relieve him from the consequences of crime, or from liability upon a contract. MAULE, J., in Martindale *v.* Faulkner, 2 C. B. 706, 719. — ED.

[2] 1 Eq. 123, § 111.

natural justice so obvious as that a right of repetition must exist in such a case, and that what belongs to one man cannot be acquired by another, without the consent or the fault of the owner. But we will briefly recur to the cases, which, as we think, have recognized the common law on this subject, and see if the principle which we have advanced is not asserted or recognized, with more or less distinctness, in all of them.

The action of *indebitatus assumpsit* for the recovery of money had and received, and for money paid, etc., is an action of the common law, but to a great extent an equitable action, adopted for the enforcement of many equitable as well as legal rights. And it is a fundamental principle of this action, that it lies for the recovery of money, which, *ex æquo et bono*, ought to be paid over to the plaintiff; and that the law, in case of such equity, will imply a promise to pay it.[1] The principles of the action were very definitely stated by Lord MANSFIELD, in the leading case of Moses *v.* Macferlan,[2] and have never since been doubted. He says, "If the defendant be under an obligation, from the ties of natural justice, to refund, the law implies a debt, and gives this action founded in the equity of the plaintiff's case, as if it were upon a contract." He particularizes, and says again: "This kind of equitable action to recover back money which ought not in justice to be kept, is very beneficial, and therefore much encouraged." He goes on to enumerate several cases in which money paid cannot be recovered back, as, if advanced in payment of a debt barred by the statute of limitations, etc., and as a reason: "Because in all these cases the defendant may retain it with a safe conscience, though by positive law he was barred from recovering." And he refers to money paid by mistake, as an instance of the equity which will sustain the action; making no allusion to a distinction between a mistake of law and a mistake of fact, — a suggestion, we believe, as applied to this action, of a much more recent date.

The same principle was recognized and applied by the Court of Common Pleas, in the case of Farmer *v.* Arundel.[3] "Whenever," says Chief Justice DE GREY, "money is paid by one man to another, on a mistake either of fact or of law, or by deceit, this action will certainly lie;" and because the defendant had good right in conscience, in that case, to retain the money, the plaintiff failed to recover, and for that reason alone, although the money was paid under a mistake of the law.

The case of Bize *v.* Dickason[4] deserves special attention, because the force of it was attempted to be parried, by Lord ELLENBOROUGH, in Stevens *v.* Lynch.[5] The facts show the case to be one of a mistake of law only. The plaintiff was a broker acting under a *del credere* commission, for foreign correspondents, and the bankrupt had been an underwriter, who was liable for losses which the correspondents of the plaintiff had sustained, and

[1] 3 Bl. Com. 163. [2] 2 Burr. 1002. [3] 2 Black. W. 824.
[4] 1 T. R. 285. [5] 12 East, 137.

which he had paid over to them, without having received the amount of the losses from the bankrupt. The plaintiff being indebted on other accounts to the bankrupt, in a still larger sum, paid the whole to the assignees of the bankrupt under a mistake, and without knowing that he had a legal right to set off against the claims of the bankrupt the amount of the losses he had paid. When he discovered, from the decision of the court, in the case of Grove *v.* Dubois,[1] that he had such right, he brought his action against the assignees of the bankrupt, to recover back the amount of the money which he had paid to them, which by law he had a right to have set off. No mistake of facts existed, and none was adverted to by Lord MANSFIELD, discussing the plaintiff's right to recover. He refers only to money paid under mistakes of law, and applies the principle he had before so very distinctly stated, in the case of Moses *v.* Macferlan, and which had again been recognized, in explicit terms, by Chief Justice DE GREY; and without reference to any possible distinction between mistakes of law and of fact, he concludes: "But where money is paid under a mistake, which there was no ground to claim in conscience, the party may recover it back again, by this kind of action." And it may be remarked that this case was decided after the case of Lowry *v.* Bourdieu,[2] in which BULLER, J., applied the maxim, *Ignorantia legis non excusat*, to money paid as the premium on an illegal gaming policy.

The next case we refer to is Brisbane *v.* Dacres, Executrix.[3] This case has been much noticed, and efforts made to press it into the service of those who have attempted to sustain the doctrines of this defence; but with what propriety, will be seen by an examination of it. MANSFIELD, C. J., and CHAMBRE, J., expressly admit the principle we advance; and it is neither denied nor doubted, as we can see, by GIBBS and HEATH, JJ. The plaintiff was the commander of a king's ship in the British navy, on the Jamaica station; and Lord Dacres was the admiral there. The plaintiff, by order of Lord Dacres, the admiral, took on board his vessel a large amount of specie belonging to the government, and transported it to England, for which service he received from the treasury a considerable sum as freight. It had been a long established usage in the navy for commanders of vessels, in like cases, to pay over one-third of the freight to the superior officer, under whose orders they acted; although, at the time this money was paid over by the plaintiff, he was not bound by law to pay it over, and the admiral had no legal right to demand it; but it was paid upon the demand of the admiral, as his right. The action was brought against the executrix of Admiral Dacres, to recover back the money so paid. CHAMBRE, J., in a very conclusive argument, maintained the right of the plaintiff to recover the money. He says: "The plaintiff had a right to it, and the defendant in conscience ought not to retain it. The rule is, that when he cannot in conscience retain it, he must refund it, if there is nothing illegal

[1] 1 T. R. 112. [2] Doug. 468. [3] 5 Taunt. 144.

in the transaction." MANSFIELD, C. J., admits the rule as stated by CHAMBRE, J., saying, "If it was against his conscience to retain this money, according to the doctrine of Lord KENYON, an action may be maintained to recover it back." But because the money was paid and received under the former usages of the navy, he considered it entirely proper and conscientious for the executrix to retain it; and for this reason alone, he opposed a recovery. GIBBS, J., founded his opinion in the defendant's favor upon the fact that the money was demanded as a matter of right, and was paid upon such a demand; and this being submitted to, and not resisted at the time, must be considered as a voluntary payment, and indeed, as a gift! — a controlling feature in the case, entirely unlike the present, and if true, proving very clearly that the money might be very honestly received and retained. HEATH, J., takes still a different ground; that there was neither ignorance nor mistake in the case, but that the plaintiff intended, in fact, to make *a voluntary* payment to his admiral. But what is most material to our purpose is, that neither GIBBS nor HEATH refers to the conscience of the case, and therefore are not at issue with their brethren, nor with us, upon this turning-point of the whole matter.

The Vice-Chancellor, in the case of Naylor *v.* Winch,[1] remarks, that "If a party, acting in ignorance of a plain and settled principle of law, is induced to give up a portion of his indisputable property, under the name compromise, a court of equity will relieve." Here, our doctrine is quite distinctly recognized: the case supposed treats the retention of the money as unconscientious and wrong, and therefore the relief will be given.

Approved text-writers recognize the law to be as we have stated. Broome, in his treatise on Law-maxims, and under the maxim, "*Ignorantia juris non excusat*," says, "It is therefore a rule, that money paid with full knowledge of the facts, but through ignorance of the law, is not recoverable, if there be nothing unconscientious in the retainer of it;" and in support of this rule, the case of Brisbane *v.* Dacres is cited; and of that case it is said that the plaintiff did not recover, because it was not against conscience for the executrix to retain the money. And so, under the maxim, "*Volenti non fit injuria*," the author states the law thus: "But where money is paid under a mistake, which there was no ground to claim in conscience, the party may recover it back again, as money had and received." And the same views of the law on this subject are expressed by Stevens, in his Nisi Prius, vol. 1, p. 349, whether the mistake be one of law or fact.

The case of Bilbie *v.* Lumley[2] has been sometimes cited in opposition to the rule as laid down in the preceding authorities. That case was not argued; was decided *instanter;* and whether the insured could, or could not *in foro conscientiæ* retain the money, does not appear, and was not a circumstance alluded to by the court. And we say, in reply to Lord ELLENBOROUGH'S reference to the maxim, *Ignorantia legis non excusat*,

[1] 1 Sim. & St. 555. [2] 2 East, 469.

that although the plaintiff's ignorance of the law may not furnish a good excuse for his paying the money, it does not follow that it furnishes a good excuse to the defendants to retain it, against the suggestions of equity and conscience.

The case of Elliott *v.* Swartwout[1] does not conflict with our views. The money there was paid over by the importer to the collector, as duties, upon a demand and claim of right, and without protest. The defendant received it in good faith, and in the same good faith had paid it over to the treasury of the United States.

The case of Stevens *v.* Lynch,[2] to which allusion has been made, was not an action to recover back money paid, but upon a promise to pay, made under a mistake of the law. The defendant was the drawer of a bill of exchange, and as such, had been legally, and was still equitably, bound to pay the money named in it; but being ignorant that his legal liability was discharged, by reason that the holder had given time to the acceptor, yet he had promised to pay it, and was holden liable. This was the case of a mere mistake of law, with the equity and conscience of the case all against him who acted under the mistake, and not in his favor, as in the case before us. It was like the case of money paid in ignorance of the legal defence of the statute of limitations, infancy, usury, etc.

We have seen but one case in which the doctrine we adopt has been directly denied by any court; it is Clarke *v.* Dutcher.[3] We need not review it, because we believe every authority referred to in that case, in support of the opinion of the court, has been now noticed by us; and we are led by them to a very different conclusion. The reasons advanced by the court there are not satisfactory to us, if we understand them. They are, that, if the equities of the case — the moral rights and duties of the parties — are to have influence in the decision, it will spoil or mar the maxim, that "every man is bound and presumed to know the law," as well as the maxim, *Volenti non fit injuria;* and also, that thereby the practical distinction between a mistake of fact and a mistake of law, will be destroyed; both of which assumptions we respectfully deny. That a party may not urge his ignorance of the law as an excuse or palliation of a crime, or even of a fault, we may admit; that he may not, by reason of such ignorance or mistake, obtain any right or advantage over another, we may admit; but we do not admit that such other may obtain or secure an unjust advantage over him, by reason of his ignorance or mistake, even of the law. We agree that men should not complain of the consequences of their deliberate and voluntary acts; but we do not agree that acts performed under the influence of essential and controlling mistakes are voluntary, within the meaning of the maxim referred to. And we say that neither maxims of law nor fictions of law should be so applied as to work manifest injustice.

[1] 10 Pet. 138. [2] 12 East, 37. [3] 9 Cow. 674.

We conclude, therefore, with entire unanimity, that the charge of the court, in this respect, ought to be sanctioned.

Another question is suggested by this motion, and was mentioned in argument, — that if this money was paid by the plaintiffs, in their capacity of executors of Northrop's estate, from the funds of his estate, under a mistaken construction of the will, and thus under a mistake of law, whether it could not be recovered back, for the benefit of the estate, whatever the law might be, if the plaintiffs had acted merely on their own individual account, as we have here treated it? This is, certainly, a question worthy of consideration; but the opinion already expressed by us renders a decision of it unnecessary.

The defendant also claimed, in his defence, that as the legacy was, by the will of the testator, payable to Mrs. Graves, the defendant's wife, and was intended, as he supposed, for her sole benefit, and was actually paid to her, he was not liable. But we think, that in legal effect the money was received by the defendant; although delivered into the hands of the wife, it was done in his presence, with his consent, and with his subsequent approval, and became subject to his disposal.

The jury were instructed to allow interest on the sum paid, from the time it was received by the defendant, on the ground that it was received by him in his own wrong, and should have been immediately restored. But a majority of the court think differently; and that no interest could accrue, under the circumstances, until demand of repayment was made. This excess of interest, therefore, allowed by the jury, must be remitted; and the court will not direct a new trial.

In considering the legal questions in this case, we are necessarily confined to the facts apparent on the record, and may not indulge in any speculations into circumstances connected with the settlement of David Northrop's estate, and from which the defendant might have considered himself, as he probably did, fairly entitled to retain the money thus received by him.

In this opinion the other judges concurred.

Part of interest to be remitted.
New trial not to be granted.

WILLIAM CULBREATH, Plaintiff in error *v.* JAMES M. and DANIEL G. CULBREATH, Defendants.

In the Supreme Court of Georgia, July Term, 1849.

[*Reported in* 7 *Georgia Reports*, 64.]

Obadiah M. Culbreath died intestate, leaving neither wife nor children. His nearest of kin were seven surviving brothers and sisters, and the children of a deceased sister. William Culbreath, the administrator, under a mis-

apprehension of the law, divided the estate equally between the seven brothers and sisters, to the exclusion of the children of the deceased sister. Subsequently, these children instituted suit against the administrator and recovered the one-eighth of the estate.

The present action was by William Culbreath against two of the distributees, to recover back the amount overpaid on account of this mistake.

Upon an agreed statement of the facts in the court below, the presiding judge awarded a nonsuit against the plaintiff, who appealed to this court.

M. J. Crawford for plaintiff in error.

E. R. Brown for defendant in error.

By the Court, — Nisbet, J., delivering the opinion. 1. The judgment of nonsuit was awarded by the court below in this case, upon the following state of facts, agreed upon by the parties: "The actions were founded upon a voluntary payment made to each of the defendants by the plaintiff, as administrator of Obadiah M. Culbreath, deceased, of one-seventh part of said intestate's estate, as part of their distributive shares of said estate, in ignorance of the law of distribution of estates. After the payments, the children of a deceased sister of the intestate and also of the defendants, in being at the time of the payments, and known and recognized as such children of a deceased sister of the intestate and of the defendants, brought suit against the plaintiff, as administrator aforesaid, to recover their distributive share of the estate of said intestate, it being one-eighth of said estate, and did recover. The suits now pending were brought by the plaintiff to recover of defendants their proportion of the over-payment to them." Upon the hearing, the presiding judge nonsuited the plaintiff, with leave to move at the next term, to set aside the nonsuit and reinstate the cases. Which motion being made, was refused, and to that decision the plaintiff excepted.

Upon the hearing before this court, it was conceded on both sides, that with a knowledge of all the facts the plaintiff acted upon a mistake of the law. That was considered as proven. Believing that the defendants were entitled to the whole of the estate of his intestate, to the exclusion of the children of his deceased sister, through a mistake as to the law he paid to them the share which was rightfully due to those children. They having sued and recovered of him their distributive share, he brings these actions to recover of the defendants the money so paid to them, through a mistake of the law. The question is, can a party recover back money paid, with a knowledge of all the facts, through mistake of the law?

We are fully aware that the authorities upon this question are in conflict, as well in England as in this country. Great names and courts of eminent authority are arrayed on either side. It is not one of those questions upon which the mind promptly and satisfactorily arrives at a conclusion. This is true in reference both to principle and authority. It is not surprising, therefore, that Judge Alexander and this court should differ. I

think, and I shall try to prove, that the weight of authority is with us. If it were so — if authorities were balanced — we feel justified in kicking the beam, and ruling according to that naked and changeless equity which forbids that one man should retain the money of his neighbor, for which he paid nothing, and for which his neighbor received nothing; an equity which is natural, which savages understand, which cultivated reason approves, and which Christianity not only sanctions but in a thousand forms has ordained. In ruling in favor of these actions, we aim at no visionary moral perfectibility. We feel the necessity of practicable rules, by which rights are to be protected and wrongs redressed. We know the necessity, too, of general rules, and how absurd would be that attempt, which seeks to administer the equity which springs from each and every case. The insufficiency which marks all lawgivers, laws, and tribunals of justice, makes that a hopeless thing. Still, where neither positive law nor a well settled train of decisions impose upon courts a prohibition, they are at liberty, nay, bound to respect the authority of natural equity and sound morality. Where these are found on one side of a doubtful question, they ought to cast the scale. Moreover, we believe that the rule we are about to lay down may be so guarded, as in its application to be both practicable and politic.

It is difficult to say that an action for the recovery of money paid by mistake of the law will not lie, upon those principles which govern the action of assumpsit for money had and received. Those principles are well settled since the great case of Moses *v.* Macfarlan, in 2 Burrow, 1005. The grounds upon which that necessary and most benign remedy goes, are there laid down by Lord MANSFIELD. This claim falls within the principles there settled, and cannot be distinguished from cases which have been ruled to fall within them, but by an arbitrary exclusion. I am not now using the case of Moses *v.* Macfarlan as the authority of a judgment upon the precise question made in this record; although Lord MANSFIELD there held, that money paid by mistake could be recovered back in this action, without distinguishing between mistake of law and fact. I refer to it, to demonstrate what are the principles upon which the action is founded. It is not founded upon the idea of a contract. In answer to the objection, that assumpsit would lie only upon a contract, express or implied, Lord MANSFIELD said, "If the defendant be under an obligation, from the ties of natural justice, to refund, the law implies a debt, and gives this action, founded in the equity of the plaintiff's case, as if it were upon contract." Again: "One great benefit derived to a suitor from the nature of this action is, that he need not state the special circumstances from which he concludes that *ex æquo et bono* the money received by the defendant ought to be deemed belonging to him."

"The defendant," says his Lordship, farther, "may defend himself by everything which shows that the plaintiff, *ex æquo et bono*, is not entitled

to the whole of his demand, or to any part of it." His summary is in the following words: "In one word, the gist of this action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money." In the language of the civilians, from whom Lord MANSFIELD borrowed many valuable principles, "*Hoc natura æquum est, neminem cum alterius detrimento fieri locupletiorem.*"

If there is justice in the plaintiff's demand, and injustice or unconscientiousness in the defendant's withholding it, the action lies; or, to use more appropriate language, the law will compel him to pay. Now, when money is paid to another, under a mistake as to the payer's legal obligation to pay, and the payee's legal right to receive it, and there is no consideration, moral or honorary or benevolent, between the parties, by the ties of natural justice the payer's right to recover it back is perfect, and the payee's obligation to refund is also perfect, — it becomes a debt. It is a case fully within the range of the *ex æquo et bono* rule. This is that case. It falls within none of the exceptions mentioned by Lord MANSFIELD. It was not paid as a debt due in honor or honesty, as in case of a debt barred by Statute; it is not paid as a donation; it was not paid as a debt contracted in violation of public law; for example, money fairly lost at play. In all such cases it is conscientious for the defendant to keep it. In this case there is no right or equity or conscience upon which the defendant can plant himself. Why, then, is not the case of a payment by mistake of the law within the principles of Moses *v.* Macfarlan?

Right here the argument might rest on principle. Just here the onus is cast upon the other side, to show how and why this case is distinguishable from other cases falling confessedly within the principles upon which the action for money had and received is based. We shall see upon what footing the distinction is placed by Lord ELLENBOROUGH. It is that of policy. The doctrine which I am now repelling never was defended upon principle; it never can be. No British or American judge ever attempted its defence on principle. It was ruled on policy, and followed upon the authority of a few precedents. A policy which, it must be conceded, does private wrong, for the sake of an alleged public good; or, I should more appropriately say, rather than risk a doubtful public evil. It was, no doubt, this view of the subject which startled the calm philosophical equity of Marshall's mind, when yielding, in Hunt *v.* Rousemanier, to precedent, he still gave in his personal protest against the doctrine. For what he said in that case can be viewed in no other light than as a personal protest. It is wise, it is necessary for courts to yield to established authority; but, inasmuch as the use of precedent is to illustrate principle, a single precedent, or a number of precedents should not control, when they are against principle.

We guard this doctrine by saying, that the action is not maintainable, where money is paid through mere ignorance of the law, or in fulfilment

of a moral obligation, or on a contract against public law, or on any account which will make it consistent with equity and good conscience for the defendant to retain it. Nor does the judgment of this court embrace cases of concealment, fraud, or misrepresentation. They depend upon principles peculiar to themselves. And farther, it is scarcely necessary to add that a recovery cannot be had, unless it is proven that the plaintiff acted upon a mistake of the law.

2. There is a clear and practical distinction between ignorance and mistake of the law.[1] Much of the confusion in the books, and in the minds of professional men, upon this subject, has grown out of a confounding of the two. It may be conceded, that at first view, the distinction is not apparent; but it is insisted that upon close inspection it becomes quite obvious. It has been ridiculed as a quibble, but we shall see that it has been taken by able men, and acted upon by eminent courts. Ignorance implies passiveness; mistake implies action. Ignorance does not pretend to knowledge, but mistake assumes to know. Ignorance may be the result of laches, which is criminal; mistake argues diligence, which is commendable. Mere ignorance is no mistake, but a mistake always involves ignorance, yet not that alone. The difference may be well illustrated by the case made in this record. If the plaintiff, the administrator, had refused to pay the distributive share in the estate which he represented, to the children of his intestate's deceased sister, upon the ground that they were not entitled in law, that would have been a case of ignorance, and he would not be heard for a moment upon a plea, that being ignorant of the law he is not liable to pay interest on their money in his hands. But the case is, that he was not only ignorant of their right in law, but believed that the defendants were entitled to their exclusion, and acted upon that belief, by paying the money to them. The ignorance in this case of their right, and the belief in the right of the defendants, and action on that belief, constitute the mistake.

The distinction is a practical one, in this, that mere ignorance of the law is not susceptible of proof. Proof cannot reach the convictions of the mind, undeveloped in action; whereas, a mistake of the law, developed in overt acts, is capable of proof, like other facts.

3. The usual reply to all this is the time-honored maxim, *ignorantia juris non excusat.* We do not make void this maxim in any fair construction of it. It is an indispensable rule of legal and social policy: it is that without which crime could not be punished, right asserted, or wrong redressed. What if its application does, in some cases, work injustice? Its overruling necessity, and the vast preponderence of its benefits over its evils, have reconciled the civilized world to its immovable status as a rule of action. The idea of excuse implies delinquency. No man can be ex-

[1] Lawrence *v.* Beaubien, 2 Bai. 623; Hutton *v.* Edgerton, 6 S. C. 485, *accord.*; Jacobs *v.* Morange, 47 N. Y. 57, *contra.* — Ed.

cused upon a plea of ignorance of the law, for disobeying its injunctions or violating its provisions or abiding his just contracts. He is presumed to know the law, and if he does not know it, he is equally presumed to be delinquent. I remark, to avoid misconstruction, that it is of universal application in criminal cases. In civil matters, it ought not to be used to effectuate a wrong. That is to say, it cannot be a sufficient response to the claim of an injured person, that he has been injured by his own mistake of the law, when the respondent, against conscience, is the holder of an advantage resulting from that mistake. The meaning, then, of this maxim is this: no man can shelter himself from the punishment due to crime, or excuse a wrong done to, or a right withheld from another, under a plea of ignorance of the law. The maxim contemplates the punishment of crime, the redress of wrong, and the protection of rights. Is it not unreasonable so to construe it as to apply it to one who has not only done no wrong and withheld no right, but is himself the injured party, as in this case? The plaintiff has violated no law, withheld no right from the defendants, and in no particular wronged them; but on the contrary, he has been injured to the extent of the money which they unrighteously withhold from him. In this view of it, too, the public policy of the maxim is sustained. I cannot see that its utility is lessened by this limitation of its application. In the language of Sir W. D. Evans, "The effect of the doctrine is carried sufficiently far for the purposes of public utility, by holding that no man shall exempt himself from a duty, or shelter himself from the consequences of infringing a prohibition imposed by law, or acquire an advantage in opposition to the legal rights and interests of another, by pretending error or ignorance of the law."[1]

The distinction between ignorance and mistake of the law, is recognized by Lord Roslyn in Fletcher *v.* Talbot;[2] by Lord Manners, in Leonard *v.* Leonard;[3] by the Court of Appeals of South Carolina, in Lawrence *v.* Bedubien;[4] and in the Executors of Hopkins *v.* Mazyck *et al.*[5]

In England, the authorities are pretty nearly *in equilibrio*, yet I must think that the preponderance, taking the cases at law and in equity together, is on the side of the principle which I am laboring to establish. This action for money had and received is an equitable remedy, and lies generally where a bill will lie; decisions, therefore, in Chancery which recognize the principle may be justly held to sustain it. The first case, then, in order of time, is that of Lansdowne *v.* Lansdowne, reported in Moseley, 364, decided by Lord Chancellor King. That case was this: The second of four brothers died seised of land, and the eldest entered upon it. But the youngest also claimed it. They agreed to leave the question of inheritance to one Hughes, a schoolmaster, who determined against the eldest brother, on the ground that lands could not ascend. Whereupon, the eldest

[1] 2 Poth. Ob. App. 297. [2] 5 Ves. 14. [3] 2 Ball & B. 180, 183.
[4] 2 Bai. 623. [5] 1 Hill Ch. 251.

agreed to divide the estate, and deeds were executed accordingly. Lord KING decreed that they should be delivered up and cancelled, as having been obtained by mistake. There is no doubt whatever, but the mistake was one of law as to the legal rights of the elder brother. It is a case in point. It is true that it has been greatly criticised. Moseley, the reporter, has been charged with inaccuracy, and was very much in disfavor with Lord MANSFIELD. Indeed, it is said that his Lordship did, on one occasion, order his reports not to be read before him. Yet there stands the case, and if supported by nothing else, it is sustained by its reasonableness. Judge MARSHALL, in referring to it, says, that it cannot be wholly disregarded.

The case of Bize *v.* Dickason was decided by Lord MANSFIELD in the Court of King's Bench. The judgment of the court was delivered as follows: "The rule has always been, that if a man has actually paid what the law would not have compelled him to pay, but what in equity and conscience he ought, he cannot recover it back again in an action for money had and received. So, where a man has paid a debt which would otherwise have been barred by the Statute of Limitations, or a debt contracted during his infancy, which in justice he ought to discharge, though the law would not have compelled the payment, yet, the money being paid, it will not oblige the payee to refund it; but where money is paid under a mistake, which there was no ground to claim in conscience, the party may recover it back again in this kind of action."[1]

This authority is incontrovertible, and has not been controverted. The case made shows a mistake of law. The mistake spoken of by Lord MANSFIELD could not have been a mistake of facts, because the case exhibits no mistake of facts, but does exhibit a mistake of the law.

The principle was sustained by a decree in Bingham *v.* Bingham.[2] There the bill was filed on the ground of a mistake in law. The Master of the Rolls said, "Though no fraud appeared, and the defendant apprehended he had a right, yet it was a plain mistake, such as the court was warranted to relieve against, and not to suffer the defendant to run away with the money in consideration of the sale of an estate to which he had no right." See the note to this case in Belt's Supplement, 79, which shows the mistake to have been one of law. Also recognized in Turner *v.* Turner;[3] in Leonard *v.* Leonard[4] by Lord MANNERS; by Lord THURLOW, in Jones *v.* Morgan,[5] and by Lord ELDON, in Stockly *v.* Stockly,[6] and in Anchor *v.* The Bank of England.[7]

To these authorities may be added the *dicta* of Lord Ch. J. DE GREY, in Farmer *v.* Arundel,[8] who declared, "That where money is paid by one man to another on a mistake either of fact or of law, or by deceit, this action

[1] 1 T. R. 285.
[2] 1 Ves. 126.
[3] 2 Ch. R. 154.
[4] Ball & B. 171.
[5] 1 Bro. C. C. 219.
[6] 1 Ves. & Bea. 23, 31.
[7] Doug. 638.
[8] 2 Black. R. 824.

will certainly lie." Of Lord KENYON, in the case of Chatfield and Paxton,[1] and of CHAMBRE, J., in Brisbane *v.* Dacres.[2] This judge, arguing the point with great strength, says, "It seems to me a most dangerous doctrine, that a man getting possession of money to any extent, in consequence of another party's ignorance of the law, cannot be called on to repay it." He illustrates by putting the very case made in principle in this record. "Suppose," says he, "an administrator pays money *per capita*, in misapplication of the effects of the intestate, shall it be said that he cannot recover it back?"

Opposed to this weight of authority in England, stand the two cases of Bilbie *v.* Lumley,[3] and Brisbane *v.* Dacres,[4] — in the latter case CHAMBRE, J., dissenting, — and the *obiter* opinion of BULLER, J.

It is worthy of remark, that Lord ELLENBOROUGH, who presided in Bilbie *v.* Lumley, afterwards in Perrott *v.* Perrott [5] holds language irreconcilable with his opinion in that case. In the latter case, he is reported to say, "Mrs. Territ either mistook the contents of her will, which would be a mistake in fact, or its legal operation, which would be a mistake in law, and in either case we think the mistake annulled the cancellation." Thus it is manifest that our judgment in this case is not without precedent in the English books.

The authority of Bilbie *v.* Lumley has been followed in this country, by Chancellor KENT, Shotwell *v.* Mundy;[6] Lyon *v.* Richmond,[7] and by the Supreme Court, in Hunt *v.* Rousmanier.[8] In the same case, however, in 8 Wheat. 215, Ch. J. MARSHALL says, "Although we do not find the naked principle, that relief may be granted on account of ignorance of the law, asserted in the books, we find no case in which it has been decided that a plain and acknowledged mistake in law is beyond the reach of equity." The case in 1 Peters, 1, was decided, however, upon other principles than that one now under discussion. The same may be said of the cases in Johnson's Chancery Reports, above referred to. Yet it may not be denied but that the courts there recognize the rule as settled in Bilbie *v.* Lumley. It may be questioned whether the recognition of that authority by the Supreme Court is worth as much as the opinion of Ch. J. MARSHALL, intimated so plainly in the above extract, as to the rule in Chancery. The leaning of Mr. J. Story, in his Commentaries on Equity, is the same way; and yet he says, "It has been laid down as unquestionable doctrine, that if a party, acting in ignorance of a plain and settled principle of law, is induced to give up a portion of his indisputable property to another, under the name of a compromise, a court of equity will relieve him from the effect of his mistake." [9]

Why it is that a party may be relieved from the consequences of a mis-

[1] See Chitty on Bills, 102.
[2] 5 Taunt. 157.
[3] 2 East, 469.
[4] 5 Taunt. 157.
[5] 14 East, 423.
[6] 1 Johns. 512.
[7] 2 Johns. 51; 6 Johns. 169, 170.
[8] 1 Pet. 1.
[9] 1 Story Eq. Jur. § 121.

take of the law, where he gives up his property, under the name of a compromise, and not under other circumstances, it is difficult to see.

Mistake of the law has been held without relief in Illinois ;[1] in Tennessee ;[2] in New Jersey ;[3] and in Alabama ;[4] and it may be elsewhere, beyond my time for ascertainment.

The contrary was expressly ruled by the Court of Appeals in South Carolina, in Lowndes *v.* Chisolm,[5] in 1827. This was followed by the great case before the same court in 1832, of Lawrence *v.* Beaubien. I call it great, because of the affluence of learning displayed in the argument by Messrs. Holmes and King on one side, and Pettigru and Bailey on the other, and because of the perspicuous condensation and ability of the opinion of Mr. J. Johnson. The doctrine, in all its bearings, is there discussed with extraordinary power, and the court unanimously decided, that "A mistake of law is a ground of relief from the obligations of a contract, by which one party acquired nothing, and the other neither parted with any right nor suffered any loss, and which, *ex æquo et bono*, ought not to be binding ; and that it makes no difference that the parties were fully and correctly informed of the facts, and the mistake as to the law was reciprocal ; but there must be evidence of a palpable mistake, and not mere ignorance of the law." The case of Lawrence *v.* Beaubien was reviewed in 1833, by the Court of Appeals, in Executors of Hopkins *v.* Mazyck and others, and its doctrines affirmed.[6] So that in South Carolina the question is definitely settled. So, also, in Massachusetts, in the same way. See May *v.* Coffin ;[7] Warder *v.* Tucker ;[8] Freeman *v.* Boynton.[9] See, also, Haven *v.* Foster.[10]

The writers on the civil law are divided as to the question whether money paid under a mistake of the law is liable to repetition. Vinnius and D'Aguesseau hold the affirmative ; so Sir W. D. Evans. The argument of the great French Chancellor, D'Aguesseau, is, to my mind, unanswerable.[11] Pothier and Heineccius maintain the negative ; and it is said that the text of the Roman Law is with them. See Rogers *v.* Atkinson ;[12] Collier *v.* Lanier.[13]

Let the judgment of the court below be reversed.

[1] 3 Gilman, 162.
[2] 8 Yerg. 298.
[3] 1 Green Ch. 145.
[4] 9 Ala. 662.
[5] 2 McCord Ch. 455.
[6] 1 Hill Ch. 242.
[7] 4 Mass. 342.
[8] 7 Mass. 452.
[9] 7 Mass. 488.
[10] 9 Pick. 112.
[11] 2 Ev. Poth., App. 308.
[12] 1 Kelly, 25, 26.
[13] 1 Kelly, 238.

PITCHER *v.* THE TURIN PLANK ROAD COMPANY.

In the Supreme Court of New York, January 6, 1851.

[*Reported in* 10 *Barbour*, 436.]

This was an appeal by the defendants from a judgment of the county court of Lewis county, affirming the judgment of a justice of the peace. The action was brought by the plaintiff, after attaining full age, to avoid an agreement made during infancy for the compromise of a suit with which he was threatened, and to recover back money paid in pursuance of such agreement. The justice rendered a judgment in favor of the plaintiff for $10 and costs.

Alanson Barnes, for the plaintiff.

E. A. Brown, for the defendant.

Gridley, P. J. The plaintiff in the justice's court sued the plank road company to recover back the sum of $10, which he had paid to compromise or settle a threatened suit against him, for the penalty of $25 for running the gate of the defendant. It is true the plaintiff would be liable at common law for the trespass; but the justice must have found that the compromise was made under the mistaken supposition that he was liable for the penalty of $25; and that finding, even if founded on less conclusive evidence than it is, would be binding on this court. Noyes *v.* Hewitt;[1] Stryker *v.* Bergen.[2]

The mistake was mutual; both the agent of the company and the plaintiff supposed that the clause giving the penalty, in the turnpike act, had been incorporated into the plank road act, of 1847. The mistake therefore was not a pure mistake of law. It was in one sense a mistake of fact. Neither party supposed that a penalty of $25 was given by the common law. Neither party had any doubt that if the statute had given a penalty for running a gate situated on a plank road, the penalty was collectible. Both parties assumed that a section giving the penalty had been incorporated into the plank road act. In that assumption they were mistaken. It cannot be doubted that this mistaken belief was a powerful motive with the plaintiff in making the settlement. If he could compromise a liability for $25 by the payment of $10, we can all see it would be a wise and prudent act to do so. Whereas he might be willing to take his chance of a suit at common law, where the damages might be nominal only.

No one will dispute the general proposition that ignorance of the law excuses no one, — every man being presumed to know the law. But I do not think that rule applies to the present case. This, as I before remarked,

[1] 18 Wend. 141. [2] 15 Wend. 490.

is not a case of pure mistake of law. It was a compromise of a claim for a penalty, which the law did not give. It was not a compromise of a doubtful claim, but of a claim for which there was no foundation at all, when it was ascertained that the penalty in question had not been applied to plank roads. It was a case where the settlement was made under the mistaken idea that the act giving the penalty had been applied to plank roads. In such cases the rule that no man is excused by reason of ignorance of the law does not apply. The daughter of a freeman of London had a legacy of £10,000 left her by the will of her father, on condition she should release her orphanage share. She accepted the legacy and executed the release. This release was set aside, although no fraud was imputed to the executor, the orphanage share being £40,000. Judge STORY says "it was a case of clear surprise in matters of fact as well as law."[1] So in Evans *v.* Llewellyn,[2] the decision was placed entirely on the ground of surprise, "the conveyance having been obtained and executed improvidently." Lord KENYON said "The party was taken by surprise. He had not sufficient time to act with caution, and therefore, though there was no actual fraud, it was something like fraud, for an undue advantage was taken of his situation. I am of opinion that the party was not competent to protect himself." The application of this doctrine to the case under consideration will be apparent when we remember that one of the parties was an infant, and the other party was threatening to make him pay the $25 "or put him through on it," unless he paid the $10.

Again: where one has a clear title, and under the idea of a compromise gives away a part of what was by law his own, he is entitled to relief. Not however where there is a disputed question, and the compromise is fair. Judge STORY says, "In the former cases the party seems to labor, in some sort, under a mistake of fact as well as of law. He supposes as a matter of fact, that he has no title, and that the other party has a title to the property."[3] In this case the plank road company claimed to have a clear right to the penalty of $25; and the plaintiff was induced to believe that they had such a right, by the mistaken supposition that such a claim was made applicable to the plank road act. Now when it turns out that this was a common error of both parties, the plaintiff is entitled to relief, on the ground that the mistake was one rather of fact than of law.

The decision may well rest upon the ground on which the county judge has placed it; viz. that this is a case where the acts of the infant may be inquired into for the purpose of seeing whether they are beneficial to his interest, or not. This has been done by the justice, who determined that the settlement or compromise was not beneficial to his interests, and set it aside. In the case of Keane *v.* Boycott,[4] Lord Chief Justice EYRE laid down the rule that when the court could pronounce the contract to be for

[1] Story Eq. Jur. §§ 117, 118.
[2] Story Eq. Jur. § 119.
[3] Story Eq. Jur. § 130.
[4] 2 H. Black. 511.

the benefit of the infant, as for necessaries, it was good; when the court could pronounce it to be for the prejudice of the infant, it was void; and in those cases where the benefit or prejudice was uncertain, the contract was voidable only. In the case of Grace *v.* Wilber,[1] it was held that an infant was not liable to be enrolled in the militia, while under eighteen years of age. And though he agrees, with the consent of his father, to serve as a substitute for another, in consideration of a certain sum of money, which is paid, such a contract is not binding on the infant; and, the infant having deserted and having been apprehended as a deserter, brought his action for trespass and false imprisonment against the officer arresting him, and recovered. Now upon these authorities, it was for the justice to decide whether the $10 were paid to settle the claim for the penalty, or to settle the whole claim against the plaintiff, for trespass at common law for running through the gate. He has found, as we must conclude, that the money was paid solely to settle the claim for the penalty, when no law existed making him liable to a penalty. Having come to that conclusion, he must have held that a settlement of a claim which had no legal existence, and the contract for the payment of $10, in liquidation of such a claim, was not beneficial to the infant. If the justice held thus, and we must presume that he did, then we are not at liberty to review his judgment. There was at least some evidence on which he founded his judgment. See 18 Wend. 141. This decision the county judge held to be binding on him; and we must regard it as conclusive upon us.

Judgment affirmed.

ARNOLD & DUBOSE, Plaintiffs in Error, *v.* THE GEORGIA RAILROAD AND BANKING COMPANY, Defendant in Error.

In the Supreme Court of Georgia, July Term, 1873.

[*Reported in* 50 *Georgia Reports*, 304.]

Railroads. Venue. Charter. Freight. Contracts. Before Judge Andrews. Wilkes Superior Court. May Term, 1873.

Arnold & DuBose brought complaint against the Georgia Railroad and Banking Company for $2362.50, overcharge in freight on 3,150,000 pounds of cotton, shipped on the cars of the defendant for a distance of 75 miles. The defendant pleaded the general issue and to the jurisdiction of Wilkes Superior Court.

The evidence made the following case: The amount of cotton was shipped, as alleged, at Washington, Wilkes county, to be conveyed by the defendant to Augusta, Richmond county, a distance of 75 miles. The freight charged by the defendant was forty-five cents per 100 pounds. The freight had

[1] 10 Johns. 455.

been paid in Augusta. The agent of defendant at Washington had no instructions to receive freight or to refuse it. Had it been offered he would have received it. The former charge was thirty-three cents per 100 pounds; from the year 1865 to the present time, during which period plaintiff's cotton was shipped, the charge has been at the rate of forty-five cents per 100 pounds. The charge by wagon, before the railroad was built, was fifty cents per 100 pounds. The plaintiffs, before the commencement of suit, demanded from the defendants seven and one-half cents on each 100 pounds of cotton shipped, as being an overcharge and illegal, under its charter. Payment was refused.

It was agreed that the case should go to the jury on both pleas, subject to the charge of the court.

The court charged that under the facts proved, the Superior Court of Wilkes county had no jurisdiction of the case; that if said court did have jurisdiction, there was nothing in the charter of the defendant prohibiting the charges of freight as made.

The jury returned a verdict for the defendant.

The plaintiffs except to the aforesaid charge of the court, both as to jurisdiction and as to the construction of the charter of the defendant.

R. Toombs, for plaintiffs in error.

W. M. & M. P. Reese, *W. H. Hull*, *E. H. Pottle*, *Hillyer & Brother*, for defendant.

TRIPPE, Judge. 3. The defendant further insists, that even if the amount charged and paid by plaintiffs was beyond the charter rates, yet it was paid voluntarily by them, and that there was no artifice, fraud, or deception on the part of defendant. This presents the question whether money, paid voluntarily by one party to another, with knowledge of all the facts, can be recovered back, on the ground that the party receiving the money could not have enforced payment by law.[1] No one will deny that if the party so paying did so with knowledge that it could not have been collected by legal process, he cannot recover it back. Money paid for a gaming debt is an exception, by special statute. Usury paid is another exception; but that not to the extent to which the party paying could have, by law, prevented its collection. He could, by setting up the defence of usury, defeat the collection of all but the original principal. If he voluntarily pay principal and usury, he could only recover back the excess of the usury over the legal interest. I speak of the law as it formerly stood; and even when, by statute, the whole contract was void on account of usury, still if the debtor paid the whole, he could reclaim nothing but what was over the lawful interest. The authorities to the effect that money paid voluntarily, without mistake of fact, though in ignorance of the law, cannot be recovered back, are numerous and almost without exception. In Culbreath *v.* Culbreath,[2]

[1] Only so much of the opinion is given as relates to this question. — ED.

[2] 7 Ga. 64.

in an elaborate decision showing that there might be a recovery where it was paid under a mistake of law, the principle is yet admitted that if it be from ignorance of law, there can be no recovery. And the great effort in that case is to set up and show that there is a difference between ignorance and mistake of the law. This principle has been, to a certain extent, embodied in the Code: see sections 3121 to 3126, inclusive, new Code. Section 3121 is, "Mere ignorance of the law on the part of the party himself, where the facts are all known, and there is no misplaced confidence, and no artifice, or deception, or fraudulent practice is used by the other party either to induce the mistake of law, or to prevent its correction, will not authorize the intervention of equity." Section 2636 provides, "mistake of law, if not brought about by the other party, is no ground for annulling a contract of sale. Mistake of a material fact may, in some cases, justify a rescission of the contract; mere ignorance of a fact will not." A strong writer has said that to allow the doctrine that ignorance of law is a ground of defence, would overturn the foundations of every system of jurisprudence:[1] and Judge Story says: "As every man is presumed to know the law, and to act upon the rights which it confers, when he knows the facts, it is culpable negligence in him to do an act or make a contract, and then set up his ignorance as a defence."[2] A few of the numerous cases determining the principle involved in this case are simply referred to.[3]

It is true that in some of those cases no distinction is taken between ignorance and mistake of law. They seem to be held as equivalent terms, and the right to relief is denied in either instance. Others of them draw a distinction, as did this court in Culbreath *v.* Culbreath,[4] and maintain the right to relief where there has been a mistake of law. In the case under consideration the plaintiffs were paying the money sued for during the years 1868 to 1872, inclusive. They now set up that the defendant had no right by law to make the charges which they paid; in other words, that the defendant charged and they paid more than the defendant was, by its charter, allowed to charge. Why, then, did they pay it? If voluntarily, or by agreement, knowing the law, no one can say they are entitled to recover it back. If voluntarily, but in ignorance of the law, we have seen that it is not sufficient, neither under the principles contained in the Code or under the decisions referred to. If there was any fraud, artifice, or deception practised by defendant, it should have been shown. Under this great weight of authority, both statutory and judicial, it may well be said, as was said by the judges pronouncing the opinion of the Supreme Court of New York, in Clarke *v.* Dutcher: "Although there are a few *dicta* of eminent judges to the contrary, I consider the current and weight

[1] Bate. Com. L. 26.

[2] 1 Story Eq. Jur. § 140.

[3] 12 East, 38; 2 East, 469; 5 Taunt. 144; 8 Wheat. 215; 2 Johns. 51; 9 Cow. 674; 1 Wend. 355; 10 Pet. 138.

[4] 7 Ga. 64.

of authorities as clearly establishing the position, that where money is paid with a full knowledge of all the facts and circumstances upon which it is demanded, or with the means of such knowledge, it cannot be recovered back upon the ground that the party supposed he was bound in law to pay it, when in truth he was not. He shall not be permitted to allege his ignorance of the law; and it shall be considered a voluntary payment:"[1] This, then, being the law of this case, although the court below erred on the question of jurisdiction, we are constrained to affirm the general judgment, as the verdict must necessarily, under the evidence, have been what it was, and this is in accordance with numerous decisions of this court.[2]

Judgment affirmed.

HEMPHILL *v.* MOODY.

In the Supreme Court of Alabama, December Term, 1879.

[*Reported in* 64 *Alabama Reports*, 468.]

Appeal from the Chancery Court of Tuskaloosa.

Heard before the Hon. Charles Turner.

The bill in this case was filed on the 24th May, 1879, by Frank S. Moody, as the administrator *de bonis non* with the will annexed of the estate of Edward Sims, deceased, against Felix F. Hemphill and his wife, Mary J., who was a daughter of said Sims; and against the personal representative and distributees of the estate of Jerusha Ready, deceased, who was also a daughter of said Sims, and the wife of Aaron Ready, deceased; and against several other persons, not necessary to be named, who were legatees under the will of said Sims and distributees of his estate. It sought to remove the settlement of the estate of Sims, from the Probate Court of Tuskaloosa, in which it had been begun, into the Chancery Court; to establish an equitable set-off against the distributees of the estate of Jerusha Ready, on account of the payment of $2000, which the complainant had wrongfully made to the personal representative of her husband, said Aaron Ready, and of which, as the bill alleged, said distributees had received the benefit on the settlement and distribution of his estate; and to enforce an equitable estoppel against said Hemphill and wife, in regard to this wrongful payment, on the ground that Hemphill had agreed and assented to said payment at the time it was made. The testator, Sims, died in Tuskaloosa, where he resided, in 1838; and his last will and testament was there duly admitted to probate. By said will, a copy of which was made an exhibit to the bill, the testator devised and bequeathed to his wife, during her life or widowhood, certain lands with slaves and other

[1] 9 Cow. 681.

[2] 41 Ga. 16; 42 Ga. 244.

property, adding, "But, if she should marry, or die, then, and in that case, it is my will that all the property I have left her should be sold, on one, two, and three years' credit, with interest after one year, except the negroes," etc. He also devised other lands to his several children, and added a residuary clause in these words: "The balance of my property, which is not given away in this will, I wish sold to the highest bidder, on a credit of one, two, three, four, five, or six years, with interest from day of sale; the purchaser giving bond and good securities, and not to have titles to lands nor lots till all the purchase-money is paid, and then to be equally divided between my above-named children." The part of the will containing the foregoing provisions was dated February 2, 1838; but another part was added, dated February 5, 1838, as follows: "Being still in my proper senses, and on a further consideration of all the matters and things, I have thought proper to alter a part of the first part of my will: that is, in case my beloved wife never marries, I wish for her to have $5000 worth of property left her, her lifetime or widowhood, she having the choice of it, to be hers forever, to do as she may think proper with; and further, by Mr. Aaron Ready putting in what I have given him heretofore, and his having rendered services which the others could not do, I give him, extra, $2000. Now, in explanation of this will, as it is done just on my starting to New York, and in a hurry, my will is, that the $5000 may be taken out of what I give my beloved wife, and the $2000 extra which I give Aaron Ready; the balance of my property, money, and everything, I leave, to be equally divided among my children," etc.

It appears that Aaron Ready first administered on the testator's estate, and that Mrs. Sims, the widow, survived until 1874; but neither of these facts is stated in the bill. Letters of administration *de bonis non*, on said testator's estate, were granted to the complainant on the 9th November, 1874; and the lands which were devised to the widow for life, and directed to be sold on her death, having been sold, as directed, and the purchase-money received by the said administrator, he paid $2000, a part of said sum of money, on the 20th May, 1876, to E. A. Graham, as the administrator of the estate of Aaron Ready, in satisfaction of the said legacy of $2000, which was supposed to be due and unpaid. On final settlement of the complainant's accounts as administrator, in the Probate Court of Tuskaloosa, in April, 1877, he claimed a credit for this payment, and it was allowed by the Probate Court, against the objections of said Hemphill and wife, who duly excepted to the ruling and decision of the court, and brought the case to this court by appeal; and this court reversed the decree of the Probate Court, and remanded the cause, as shown by the report of the case. Hemphill *v.* Moody.[1] The complainant thereupon filed his bill in this case, asking a removal of the settlement into the

[1] 62 Ala. 510.

Chancery Court, and seeking to get the benefit of this payment, on his final settlement, as against Hemphill and wife, and also against the children of Jerusha Ready, the wife of said Aaron Ready, who were alleged to be the distributees of her estate, and also the distributees of said Aaron Ready's estate. In reference to this payment to Ready, the bill, as amended, contained the following allegations: "That the said sum of $2000 was paid by him, in discharge of said legacy to Aaron Ready, under a mistake of law and fact, in this: that the will of said Sims had been interpreted for the legatees therein named, by John J. Ormond, a man learned in the law, and formerly one of the justices of the Supreme Court of Alabama, who gave it as his opinion, as your orator is informed and believes, and so states, that said legacy was not payable until after the death of said testator's widow; and that this opinion was accepted and acted upon by the legatees aforesaid; and furthermore, that said payment was made by your orator under the belief and supposition that the interpretation put upon said will by said Ormond was a proper construction of said will, and had been accepted and concurred in by all the legatees under said will, and especially by said Ready and said Hemphill, and under the belief that said legatee had never been paid; and furthermore, that when said legacy was paid by complainant, and previous thereto, he was informed and believed that his predecessors in the administration of said estate, and the legatees under said will, and the original executors of said will, uninterruptedly admitted that said legacy had never been paid, and concurred in the desire that the same should be recognized and paid, as a valid and existing legacy under the will of said Sims." The bill alleged that Hemphill and his wife were married in 1846, and the complainant insisted that they were concluded by the payment, and ought not to be allowed to charge him with a *devastavit* on account of it, because Hemphill had assented to the payment at the time it was made, and had acquiesced in the construction placed on the will. As to the distributees of Jerusha Ready's estate, it was alleged that they were also the distributees of the estate of Aaron Ready, and had received from his administrator the $2000 paid to him by the complainant, less the expenses of administration; that they were insolvent; that Aaron and Jerusha Ready had both been dead many years, and their estates had been finally settled and distributed; that letters of administration on the estate of the former had been granted to Graham, for the sole purpose of enabling him to collect and distribute the said $2000; that the estate of Jerusha owed no debts, and letters of administration on it had been granted to one of the defendants, only for the purpose of coercing payment a second time of their distributive portion of said sum of $2000, which was alleged to be less than they had received from Graham. As to these distributees, on these facts, the complainant asked that he be allowed to retain as an equitable set-off, out of their proportionate share of said $2000, and out of other moneys in his hands

decreed to them on the former settlement, so much as they had received from Graham out of the money paid to him by the complainant.

Hemphill and wife answered the bill, and incorporated in their answer a demurrer for want of equity, specially assigning the following (with other) causes of demurrer: 1st, that the complainant was concluded by the decree of the Probate Court; 2d, that he made the payment in his own wrong, and could have no relief against it, either at law, or in equity; 3d, that the facts stated did not establish an equitable estoppel; 4th, that the bill showed no sufficient reason for removing the settlement into the Chancery Court; 5th, that the facts alleged did not show any right to an equitable set-off; 6th, that the complainant's remedy, if he had any at all, was by action at law against the administrator of Aaron Ready's estate. The administrator and children of Jerusha Ready also answered, and demurred to the bill, assigning specially the same causes of demurrer. The Chancellor overruled the demurrer on these grounds, and held that the bill contained equity. The appeal is sued out in the name of Hemphill and wife *et al.*, and the overruling of their demurrer to the bill is assigned as error.

A. C. Hargrove, for appellants.

J. M. Martin, and *H. M. Somerville*, for appellee.

Stone, J.[1] It is a maxim, born of necessity, that all men are conclusively presumed to know the law. Without this, legal accountability could not be enforced, and judicial administration would be embarrassed at every step. The necessity of this rule is more felt and acknowledged in criminal accountability, than in mere civil obligations. As a corollary, there has grown up another maxim, that courts will not reform or redress those acts of parties, which are the result of pure mistake of law. Jones *v.* Watkins;[2] Trustees *v.* Keller;[3] Haden *v.* Ware;[4] Dill *v.* Shahan;[5] Town Council of Cahaba *v.* Burnett;[6] Lesslie *v.* Richardson.[7] But, in civil proceedings, this rule, owing to its hardship, has been treated as one *stricti juris;* and if there was intermixed with the mistake of law any mistake of fact, courts have willingly seized upon it, and made it the ground of relief. There is a class of cases, hard to distinguish from mistakes of law, where, through mistake, a written agreement contains substantially more or less than the parties intended, or where, from ignorance or want of skill in the draughtsman, the object and intention of the parties, as contemplated by the agreement, is not expressed in the written instrument, by reason of the use of inapt expressions; in which the Court of Chancery, on clear and satisfactory proof of the mistake, will reform such agreement, and make it conform to the true intention of the contracting parties.[8] The principle on which courts relieve, in cases falling within this class, is that through ignorance

[1] Only so much of the opinion is given as relates to the second cause of demurrer. — Ed.

[2] 1 Stew. 81. [3] 1 Ala. 406. [4] 15 Ala. 149.

[5] 25 Ala. 694. [6] 34 Ala. 400. [7] 60 Ala. 563.

[8] 1 Brick. Dig. 681, §§ 606, 610.

or misapprehension of the legal effect of the terms agreed upon, the parties have made a contract variant in legal construction from the one intended. Trapp *v.* Moore;[1] Larkins *v.* Biddle.[2] We refer to this class of cases, not because they shed any direct light on the case in hand, but because they show that courts seize upon small circumstances, to relieve parties of a hard, though necessary rule. And there are other cases in which this rule is relaxed. Hardigree *v.* Mitchum.[3]

In the present case, Moody, the administrator of Sims, paid to the administrator of Aaron Ready $2000, the sum of a pecuniary legacy bequeathed by the will of Sims. In the case of Hemphill *v.* Moody, we held this payment was unauthorized, and that Moody was not entitled to a credit for it in his settlement as administrator of Sims. One purpose of the present bill is to have that payment applied to the extinguishment of the distributive interest of Aaron Ready's children in said estate. The averments of the bill are, that the children of Aaron Ready and the children of Jerusha Ready, his wife, daughter and legatee of testator Sims, are the same; that they are insolvent; that the $2000 paid by mistake to Aaron Ready's administrator, were distributed and paid, less expenses of administration, to said children of Aaron and Jerusha Ready; that in this way they, the children — distributees alike of Aaron and Jerusha Ready — have received of the moneys of complainant more than their share of the undistributed assets of the estate of testator Sims, and that it is contrary to equity and good conscience that they should again receive payment out of the private purse of complainant Moody. The answer, if we were allowed to look to it, denies that the children of Aaron Ready and the children of Jerusha Ready, are entirely the same; sets up, that after the death of Jerusha Ready, Aaron married a second time, and left issue by the second marriage, who shared in the distribution of the $2000 paid to Ready's administrator. In the present state of the record, and on the present appeal, we cannot know or inquire how this question stands. Only the averments of the bill are before us. Taking those averments as a guide, the share of the undistributed assets of testator's estate to which Mrs. Ready's administratrix is entitled, is $1100 or $1200. There is no averment in the bill showing the amount of the $2000 distributed and paid to the distributees of Aaron Ready, which went to the distributees of Jerusha Ready. Guided, however, by the bill, the sum distributed and paid to them exceeds the distributive share of Jerusha Ready's estate in the undistributed assets. The bill avers that Jerusha Ready died many years ago; that her estate owes no debts, and that the only function and duty her administratrix will be required to perform, is the distribution of her intestate's distributive share among her distributees, next of kin.

We do not think this case, so far as it seeks relief against Jerusha Ready's distributees, stands on the naked principle of a suit to recover back

[1] 21 Ala. 693. [2] 21 Ala. 252. [3] 51 Ala. 151.

money paid under a mistake of law. The bill makes no effort to recover the money back. Its object is, to have a payment, actually made, applied in extinguishment or reduction of a debt or liability actually due and owing. Guided, as we have said, by the averments of the bill, Moody, the complainant, was liable to pay — was indebted — to Jerusha Ready's estate, to be distributed and paid to her next of kin, $1100 or $1200; no more. He has paid, and they have received a larger sum than that, to which they had no other rightful claim. They cannot demand a second payment, on the technical ground that, when the payment was made, it was erroneously supposed to be due on another account. Payment discharges a debt, no matter when, or by whom made.

The decree of the Chancellor is reversed, and a decree here rendered, sustaining the demurrer to every feature of the bill, except that which seeks relief against the personal representative and distributees of Jerusha Ready; and to that extent, the bill is retained. The injunction against proceeding with the settlement in the Probate Court is dissolved. Let the costs of appeal in this court, and in the court below, be paid by the appellee.

WEBB *v.* CITY COUNCIL OF ALEXANDRIA.

IN THE SUPREME COURT OF APPEALS OF VIRGINIA, APRIL 15, 1880.

[*Reported in* 33 *Grattan*, 168.]

THIS was a suit in equity in the corporation court of Norfolk, brought by the City Council of Alexandria against Lewis W. Webb, to compel the said Webb to return to the plaintiff four bonds, each for $500, which had been issued by the plaintiff to Webb. There was a decree in favor of the plaintiff, and Webb obtained an appeal to this court. The case is fully stated in the opinion of the court delivered by Judge CHRISTIAN.

Judge *Burroughs* for the appellant.

Charles E. Stuart for the appellee.

CHRISTIAN, J., delivered the opinion of the court.

This case is before us on appeal from a decree of the corporation court of the city of Norfolk. The case is a sequel to the suit of Fairfax against the City Council of Alexandria, reported in 28 Gratt. 16.

The facts disclosed by the record, so far as they are necessary to be noticed in this opinion, are as follows: Dr. Orlando Fairfax was the owner, prior to the 4th day of May, 1864, of certain registered bonds, or certificates of stock, issued by the city of Alexandria for the sum of $8700.

On the 4th day of May, 1864, by a decree of the district court of the United States for the eastern district of Virginia, this stock or debt was confiscated and condemned, and a writ *venditioni exponas* was awarded by

said court. At the sale made under that writ, the appellant became the purchaser of $2000 of said stock, and on the 1st day of August, 1861, at his request, the United States marshal made a transfer of the same on the books of the appellee; and, thereupon, also at his request, two certificates of stock, of $1000 each, were issued to the appellant.

By an act of the general assembly, approved February 14, 1872 (see Acts of 1871–72, p. 73), the city of Alexandria was authorized to call in all the evidences of indebtedness of said city in the form of stocks, bonds, and certificates theretofore issued, and to issue in their place a like amount of registered coupon bonds, bearing six per cent interest, payable semi-annually, the bonds payable thirty years after date, the coupons of which were declared to be receivable in payment of the city taxes and of any other indebtedness due to the said city.

When the certificates of stock, transferred to the appellant by order of the United States marshal under the proceedings of the confiscation sale in 1864, became due, he by letter and in person demanded their payment, and threatened suit thereon unless payment was made.

He did not, however, institute his suit, but accepted from the City Council of Alexandria, in lieu of said certificates of stock for $2000, four coupon bonds for the sum of $500 each, issued under the aforesaid act, bearing date 1st of July, 1872, and payable thirty years after date.

At the time of the confiscation proceedings in the district court of the United States, the certificates of stock owned by Orlando Fairfax were in his possession, and in February, 1874, all of them having previously fallen due, he commenced suit thereon against the city of Alexandria. The circuit court of said city gave a judgment against Fairfax and in favor of the said city. On a writ of error to that judgment this court reversed the same, and rendered a judgment against said city of Alexandria and in favor of said Fairfax for the sum of $8700 with interest and cost.

The case was then carried by writ of error to the Supreme Court of the United States, where the decision of this court was affirmed.

It is further shown by the record that immediately after the rendition of the judgment of this court the City Council of Alexandria directed its officers not to transfer any bond held by the appellant, nor to pay nor receive any of the interest coupons detached therefrom. And a few days after the decision of the Supreme Court of the United States affirming the judgment of this court, the City Council of Alexandria filed their bill praying that the bonds and coupons held by the appellant and which represented the stock purchased by him at the "confiscation sale of Fairfax's property," might be delivered up for cancellation; and that the interest on said stock and bonds paid by the appellee to the appellant might be decreed to be paid back; and that the defendant might be restrained by injunction from selling, hypothecating, or otherwise disposing of the bonds Nos. 209, 210, 211, and 212, or the coupons annexed thereto, or detached therefrom, these being

the coupon bonds issued to the appellant in lieu of the certificates of stock purchased by him at the confiscation sale.

This bill was presented to the judge of the corporation court of the city of Norfolk, who awarded an injunction in accordance with the prayer of the bill.

Upon the hearing, the injunction was perpetuated, and a decree was entered ordering the bonds and coupons in the hands of the appellant to be delivered up and cancelled, and directing that the appellant pay to the appellee the sum of $540, with interest from the date of the institution of the suit, and costs.

From this decree an appeal was allowed by one of the judges of this court.

The court is of opinion there is no error in the decree of the said corporation court.

First. It has been definitely declared and established both by this court and the Supreme Court of the United States, that the decree of confiscation entered by the district court of the United States, against Orlando Fairfax, directing a sale of the certificates of stock issued to him by the city of Alexandria, was a mere nullity and absolutely void.

This court based its judgment on two grounds: *First*, that the district court had no jurisdiction of the case, for the reason that there was no proper seizure of the stock; and *second*, that by reason of a rule of that court denying to "traitors" and "rebels" (so-called by said court) the right to appear and make defence in such cases, Orlando Fairfax was in effect not a party to the proceedings.

The Supreme Court of the United States based its judgment solely upon the ground that there was no proper seizure of the stock, because the process was not served upon a proper officer of the corporation, as required by the statute law of Virginia. But it was adjudged by both courts, that the confiscation sale was a mere nullity, and that the purchaser acquired no title by his purchase at said sale.

There can be no doubt that the appellee issued and the appellant accepted the two certificates of $1000 each under the erroneous belief that by virtue of the decree of confiscation, the debt due to Orlando Fairfax had been forfeited and his title thereto extinguished, and that the appellant, as purchaser, under the writ of *venditioni exponas* issued under that decree, had become the rightful owner of $2000 thereof.

It is also equally free from doubt that the coupon bonds were given and accepted in exchange for those certificates under the same erroneous conviction. In point of fact, the coupon bonds were issued for the original claim of the appellant. There was no new contract and no new consideration.

If the appellant acquired no title by his purchase at the confiscation sale, to the certificates of stock sold at such sale, which has been declared by this court and the Supreme Court of the United States void, he could

acquire no better title by accepting without any new or further consideration the coupon bonds issued for the same indebtedness.

When the four coupon bonds of $500 each were issued to the appellant under the act of 1872, the appellee was funding its whole debt of nearly a million of dollars by issuing similar bonds to all its creditors. At that time there was no controversy between the appellant and appellee as to the title to the said certificates of stock, and there had been no adjudication of the validity of the confiscation sale. But on the contrary, the corporation found on its books this stock transferred by order of the United States marshal to the appellant at his request, and they issued to him as the apparent owner on their books, the four coupon bonds in the place of the two certificates of stock. The corporation did not know and could not know at that time that the confiscation sale was void. It was only years afterwards, when Orlando Fairfax brought his suit, that they had any notice that the validity of that sale would be contested. All that the corporation knew or could know at that time, was the fact that a court of competent jurisdiction had decreed a sale of the certificates of stock due to Fairfax, and that at that sale the appellant had become the purchaser, and that at his request the marshal making the sale had had the stock to the amount of $2000 transferred to the appellant. It was not for the corporation to question the validity of that sale. Its duty was to direct the payment of said stock to the real owner, and, according to the decree of the district court of the United States, the appellant was the owner. To him they issued the four coupon bonds in place of the stock purchased by him. It is plain that the issuance of said bonds created no new liability. They represented the same debt and for them there was no new consideration. It is clear, therefore, that if the appellant had no title to the stock he had none to the coupon bonds issued in its place.

The claim of the appellant is based upon two grounds: *First*, that the appellee is not entitled to relief in a court of equity, because it is estopped by its conduct from denying the defendant's title to the coupon bonds and the coupons due thereon; and *second*, because if the said certificates of stock were transferred and the said coupon bonds issued in their place were so transferred and issued by mistake as to the rights of the parties, that mistake is one of law; and in equity as well as at law the maxim *ignorantia juris neminem excusat* must prevail. We will briefly notice both of these objections.[1]

The court is further of opinion that the rule invoked by the appellant, *ignorantia juris non excusat*, does not apply in this case.

While it is a general rule that mistake in matter of law cannot be admitted as ground of relief, it is not a rule of universal application, especially in courts of equity. It is not an absolute and inflexible rule, but has its exceptions, though such exceptions, in the language of Judge STORY, are

[1] Only so much of the opinion is given as relates to the second objection. — ED.

few, and generally stand upon some very urgent pressure of circumstances. If the maxim is used in the sense of denoting general law, the ordinary law of the country, no exception can be admitted to its general application; but it is otherwise when the word *jus* is used in the sense of denoting a private right. If a man, through misapprehension or mistake of the law, parts with or gives up a private right of property, or assumes obligations upon grounds upon which he would not have acted but for such misapprehension, a court of equity may grant relief, if under the general circumstances of the case it is satisfied that the party benefited by the mistake cannot in conscience retain the benefit or advantage so acquired.

It has also been held in numerous cases that where the law is confessedly doubtful and about which ignorance may well be supposed to exist, a person acting under a misapprehension of the law will not forfeit any of his legal rights by reason of such mistake. See Kerr on Fraud and Mistake, 398–401, and cases there cited.

Exceptions to the general rule that mistake of law furnishes no ground of relief are fully recognized by this court in the cases of Zollman *v.* Moore;[1] and Brown *v.* Rice's adm'r.[2]

Now it is to be remarked that the appellant's claim was based upon his purchase at a confiscation sale made under an act of Congress which was in itself a war measure, and not an ordinary general law, but was an extraordinary enactment for a specific purpose and amid exigencies arising out of civil war.

This act of Congress, at the time of the transfer of stock above mentioned and the substitution of the coupon bonds in their place, had not been construed by courts, nor the mode of its operation and execution determined.

It would be vain to say, in such a case, that the City Council of Alexandria knew, or ought to have known, how such a law, new and extraordinary in its nature, would be construed by the courts, and whether seizure and confiscation under it would be declared regular and valid, or irregular and invalid, according to the mode in which the process was executed, or other proceedings had thereunder.

But was the mistake here a mere mistake of law? It is true the district court of the United States had jurisdiction under the confiscation act, and of this no one can be presumed to be ignorant. But in the case of confiscation of Fairfax's stock the jurisdiction of the court did not attach because the stock was not properly seized by the marshal.

The mode of seizure was prescribed by the attorney-general to the district attorney; and whilst these instructions had the force of law, they could not be regarded as constituting a part of the general law of which every man is presumed to be cognizant. And, so also, it may be said that the rule adopted by the district court of the United States, denying to

[1] 21 Gratt. 313. [2] 26 Gratt. 467.

rebels and traitors the right to appear and make defence in confiscation suits, so far from being a part of the general law, was against law and void. So that the two grounds upon which this court and the Supreme Court of the United States based their decisions in declaring the confiscation sale to be void were founded upon questions of fact as well as questions of law.

It cannot, therefore, be said that the appellee is seeking relief upon the ground of mistake in law. But apart from all this the peculiar circumstances of this case, taken in connection with the proceedings in the confiscation case above referred to, and the decisions of both this court and of the Supreme Court of the United States in reference to the same, it is a case strongly appealing to a court of equity for relief.

The rule laid down by Mr. Kerr, and for which he cites numerous authorities, that "If a man through misapprehension or mistake of law parts with or gives up a private right of property, or assumes obligations upon grounds upon which he would not have acted but for such misapprehension, a court of equity may grant relief, if, under the general circumstances of the case, it is satisfied that the party benefited by the mistake cannot in conscience retain the benefit or advantage so acquired," has peculiar application to this case.

Under the decision of this court affirmed by the Supreme Court of the United States, the City Council of Alexandria is compelled to pay over to Orlando Fairfax the sum of $8700, the stock issued to him, and if the claim of the appellant be allowed, the appellee must pay him also the sum of $2000 of the same stock which he acquired by purchase at a sale declared to be utterly void. And it also appears by this record that for this stock thus purchased he paid only the sum of $400, upon which he has received in the shape of interest the sum of $1699.60. To hold the city of Alexandria responsible under such circumstances would be grossly inequitable and unjust.

We think it is plain upon the whole case, that the appellee is entitled in equity to the relief prayed for. And of this the appellant has no just cause for complaint, but on the contrary is most fortunate, for though a purchaser at a sale declared to be void, he has realized a large sum in interest and dividends, which amply reimburse him for the outlay of money which he made.

The court is therefore of opinion that there is no error in the decree of the corporation court of the city of Norfolk, and that the same must be affirmed.

Decree affirmed.

SARAH ROGERS, Plaintiff in Error *v.* WALSH & PUTNAM, Defendants in Error.

In the Supreme Court of Nebraska, November Term, 1881.

[*Reported in* 12 *Nebraska Reports*, 28.]

Error to the district court for Lancaster county. Heard there before Pound, J., on demurrer to the petition. Demurrer sustained and cause dismissed.

W. J. Lamb for plaintiff in error.

Mason & Whedon, for defendants in error, cited Lambert *v.* Heath;[1] Otis *v.* Cullum;[2] Loan Association *v.* Topeka;[3] Charter *v.* Hopkins.[4] Most of the cases cited by the plaintiff relate to forged paper. They rest on a different principle than the one at bar. In those cases, the purchasers did not get what they intended to buy, and did buy. They got forged paper, and not true and genuine. In the case at bar the plaintiff in error got exactly what she intended to buy and did buy. The commissioners record of York county, in respect to these warrants, was open for her inspection and examination, and it was a question of law whether these warrants were *ultra vires* and not of fact, and it is too well established that money paid under a mistake of law cannot be recovered back, to need citation of authorities in this court for its support. Here was no bad faith, no liability *ex delicto*, no claim or pretence of that kind. And here is a full performance of everything that the law implies *ex contractu*, that the warrants belonged to the defendants in error, that they were not forgeries. It is admitted that the warrants sold were not forgeries; it is admitted that they belonged to Walsh & Putnam, that there was no warranty or guaranty. There was no express stipulation, there was no liability beyond the implied guaranty that Walsh & Putnam were the owners of these warrants, and where there is no express stipulation there is no liability.

Lake, J. The warrants in question, having been issued by the commissioners of York county without authority of law, were void. We have presented to us, therefore, the single question, whether, under the circumstances of their sale, they were a good consideration for the money which the plaintiff paid for them.

It is averred in the petition that at the time of this purchase and the payment of the money, there were genuine valid county warrants in the market where these were bought, and that the plaintiff supposed those in question to be such, until long after she received them. Indeed, from the facts alleged, there can be no doubt that the purchase was made with the full belief on her part, and probably on the part of the defendants, that what was obtained by it were the genuine warrants of York county. Such

[1] 15 M. & W. 486. [2] 91 U. S. 447. [3] 20 Wall. 665. [4] 4 M. & W. 399.

being the case, but for the seeming confidence of the defendants' counsel in the strength of their position, we would not suppose a doubt could have existed that there was an entire want of consideration for the payment of the money, and that the plaintiff was entitled to a return of the price paid for what had proved to be wholly worthless.

The defence here made rests chiefly upon the authority of two cases cited, one English and the other American, viz. Lambert *v.* Heath,[1] and Otis *v.* Cullum.[2] But the facts of those cases were so different in character from those of the one at bar, that the governing principle in them is inapplicable here. In those cases the purchasers actually obtained just what they had contracted to buy, and the decisions were put upon that ground alone, there being no express warranty. Here, however, the purchase was of the warrants of York county, while in fact what were received as such were not the warrants of that county at all, but only things in their similitude. Having been issued by the commissioners without authority of law, they can no more be considered the obligations of that county, than if signed by any other of her citizens. They are merely valueless pieces of paper, resembling York county warrants, nothing more.

The principle that should govern here was applied in the case of Young *v.* Cole, reported in 32 Eng. Com. Law, 334, and cited in Benj. on Sales, Sec. 607. The sale there considered was of certain Guatemala bonds, which, because unstamped, had been repudiated by the government of that state, and were therefore valueless, of which facts both seller and purchaser were at the time ignorant, and it was held that the defendant should restore the price he had received. In commenting upon the facts of that case Tindal, C. J., said, that the contract was for real Gautemala bonds, and the question was not one of warranty, but whether the defendant had not delivered something which, though resembling the article contracted to be sold, was of no value.

On the facts alleged in the petition we are of opinion that the pretended warrants were not a valid consideration for the price paid therefor, and that the plaintiff should recover. The judgment is therefore reversed, and the cause remanded to the court below for further proceedings.

Reversed and Remanded.

WAPLES *v.* UNITED STATES.

In the Supreme Court of the United States, March 3, 1884.

[*Reported in* 110 *United States Reports*, 630.]

Mr. *C. W. Hornor* and Mr. *Mason Day* for appellant.

Mr. *Solicitor-General* for appellee submitted the case on his brief.

Mr. Justice Field delivered the opinion of the court.

[1] 15 M. & W. 484. [2] 91 U. S. 447.

In March, 1865, the plaintiff purchased for the sum of $7400 certain real property in New Orleans at a sale upon a decree rendered by the district court of the United States in proceedings for its confiscation under the Act of July 17, 1862, and subsequently obtained a deed of the property from the marshal. The proceedings were instituted in the usual form by a libel of information filed on the 7th of August, 1862, by the district attorney of the Eastern District of Louisiana on behalf of the United States, against ten lots of ground alleged to be the property of Charles M. Conrad. The libel sets forth that the marshal of the district, under authority from the district attorney, given pursuant to instructions of the Attorney-General, had seized the lots of ground, which are fully described, as forfeited to the United States; that they were owned by Conrad then, and on the 17th of July, 1862, and previously; that after that date he had acted as an officer of the army or navy of the rebels in arms against the government of the United States, or as a member of Congress, or as a judge of a court, or as a cabinet officer, or as a foreign minister, or as a commissioner, or as a consul of the so-called Confederate States. Indeed, many other official positions he is charged in the alternative with holding, the district attorney evidently regarding him as a person of so much consequence that he must have been called to some official position by the Confederate government, in which he gave aid and comfort to the enemies of the United States, and therefore his right, title, and estate in the property was forfeited, and ought to be condemned. Publication of monition followed, and no one appearing to answer, judgment by default was entered, declaring that the lots of land, the property of Conrad, were condemned as forfeited to the United States, and a decree for their sale was entered. In the writ issued to the marshal and in his deed of sale, the lots are described as the property of Conrad. Under the Act of Congress no other interest than that of Conrad was forfeited, and no other interest was sold. It was for his alleged offences that the libel was filed and the forfeiture sought. It was undoubtedly in the power of Congress to provide for the confiscation of the entire property as being within the enemy's country, without restricting it to the estate of the defendant, but Congress did not see fit to so enact; and, as we said in speaking of the proceedings in this case: "The court cannot enlarge the operations of the stringent provisions of the statute. The plaintiff had notice of the character and legal effect of the decree of condemnation when he purchased, and is therefore presumed to have known that if the alleged offender possessed no estate in the premises at the time of their seizure, nothing passed to the United States by the decree or to him by his purchase." Burbank *v.* Conrad[1] alleged

[illegible] could be true with reference to any layman who might have been the purchaser, but with special force may it be applied to the plaintiff, who

[1] 96 U. S. 291.

as the district attorney directed the seizure and conducted the proceedings to the decree.

It turned out in other litigation that at the time of the seizure Conrad possessed no estate in the premises. He had transferred the property by a public act of sale before a notary, on the 31st of May, 1862, before the confiscation statute was passed, which applied only to the property of persons thereafter guilty of acts of disloyalty and treason. In express terms it withheld from its application the property of persons who before its passage may have offended in those respects. Conrad's power of disposition when he made his sale to his sons was not impaired by anything he may previously have done. This was expressly adjudged by this court in the case of Conrad, the son, against the plaintiff.[1]

But because of the general language used in the description of the property in the libel of information and in the deed of the marshal, it is contended that something more than the estate of the offender Conrad was warranted by the United States to the purchaser, and the warranty having failed, that he is entitled to a return of the purchase money; but this position is without even plausible foundation. As already stated, the plaintiff was presumed to know the law on the subject, and that by his purchase under the decree he could only acquire such an estate as the alleged offender possessed, to hold during the offender's life; and that if the offender had no estate none was forfeited to the United States, or sold under the decree of the court. So no false assurance could have been made to the purchaser which could be suggested as a possible ground for the return of the money; nor could there have been any mistake of fact which would be recognized as a ground for relief even in equity, for the fact suggested as having been misunderstood was declared by the law.

Besides, the title to the property sold under judicial process is not warranted by the party obtaining the judgment of the court. Whatever title the law gives, the purchaser takes, no more and no less; and he must govern himself accordingly. Any different rule prevailing on this subject in Louisiana or any other State by statute cannot change the position of the United States with respect to judicial sales in proceedings instituted by them.

Nor is this position at all affected by the doctrine that upon the reversal of a judgment under which a sale has been had, the purchaser is entitled to a return of his money. There has been no reversal of the judgment in the confiscation proceedings against Conrad. On the contrary, it has been affirmed.

Judgment accordingly.

[1] 96 U. S. 279.

(*b.*) *Mistake may be as to the Creation of a Contract.*

MARTIN *v.* SITWELL.

In the King's Bench, Easter Term, 1692.

[*Reported in* 1 *Shower*, 156.]

Indebitatus assumpsit for five pounds received by the defendant to the plaintiff's use, *non assumpsit* pleaded.

Upon evidence it appeared that one Barksdale had made a policy of assurance upon account for five pounds premium in the plaintiff's name, and that he had paid the said premium to the defendant, and that Barksdale had no goods then on board, and so the policy was void, and the money to be returned by the custom of merchants.

At the trial I urged these two points. First, That the action ought to have been brought in Barksdale's name, for the money was his, we received it from him, and if the policy had been good it would have been to his advantage; and upon no account could it be said to be received to Martin's use, it never being his money. Besides, here may be a great fraud upon all insurers, in this, that an insurance may be in another man's name, and if a loss happen then the insurer shall pay, for that some *cestui que trust* had goods on board; if the ship arrive, then the nominal trustee shall bring a general *indebitatus* for the premium, as having no goods on board.

To all which Holt, Chief Justice, answered, that the policy being in Martin's name, the premium was paid in his name and as his money, and he must bring the action upon a loss, and so upon avoidance of the policy for to recover back the premium. And as to the inconveniences, it would be the same whosoever was to bring the action, and therefore the insurers ought with caution to look to that beforehand.

Then, secondly, I urged that it ought to have been a special action of the case upon the custom of merchants, for this money was once well paid, and then by the custom it is to be returned upon matter happening *ex post facto*. I argued if the first payment were made void, then the law will construe it to be to the plaintiff's use, and so an *indebitatus assumpsit* will lie. But when a special custom appoints a return of the premium, an *indebitatus* lies not, as for money received to the plaintiff's use, but a special action of the case upon that particular custom.

To which Holt, Chief Justice, answered me with the case adjudged by Wadham Wyndham, of money deposited upon a wager concerning a race, that the party winning the race might bring an *indebitatus* for money re-

ceived to his use, for now by this subsequent matter it is become as such. And as to our case the money is not only to be returned by the custom, but the policy is made originally void, the party for whose use it was made having no goods on board; so that by this discovery the money was received without any reason, occasion, or consideration, and consequently it was originally received to the plaintiff's use.

And so judgment was for the plaintiff against my client.

KILGOUR *v.* FINLYSON, GALBREATH & HARPER.

In the Common Pleas, February 11, 1789.

[*Reported in* 1 *Henry Blackstone*, 155.]

Indorsee against the ostensible indorsers, who also appeared to be the drawers of a bill of exchange. Money paid, money had and received, account stated. Verdict for the plaintiff.

The circumstances of this case were as follows: —

The plaintiff was a warehouseman and factor, the defendants were also warehousemen and factors in partnership, from Midsummer 1785, to the 28th of July, 1787, when the partnership was dissolved, and notice of the dissolution given in the Gazette as under, —

Notice is hereby given, that the copartnership between Thomas Finlyson, Thomas Galbreath, and Henry William Harper, of Bow church-yard, warehouseman, under the firm of Finlyson, Galbreath, and Harper, and also at Glasgow, under the firm of Henry William Harper and company, was by mutual consent dissolved this day; all demands upon the above firm will be paid by Thomas Finlyson of Bow church-yard, who is impowered to receive and discharge all debts due to the said copartnership.

Witness our hands, this 28th day of July, 1787,

Thomas Finlyson,
Thomas Galbreath,
Henry William Harper.

At the time of the above dissolution one Scott was indebted to the partnership in 758*l.* and the partnership indebted to Sterling Douglas & Co. in 890*l.* On the 21st of September, 1787, Finlyson drew the bill in question in the name of the late partnership, on Scott, payable on the 23d of November following, for 304*l.* 2*s.*, which Scott accepted. On the 9th of October, Finlyson indorsed it, in the name of the partnership, to the plaintiff, who discounted it, by giving his own promissory note for 304*l.* 3*s.* 6*d.* payable on the 25th of November (the difference of 1*s.* 6*d.* being on account of the note being due two days later than the bill). This note of

the plaintiff's was indorsed by Finlyson to Sterling Douglas & Co., who discounted it, and received the money they had advanced by so discounting the note, back again from Finlyson, in part of payment of the debt owing to them from the partnership. When the note became due the plaintiff paid it to Sterling Douglas & Co. Two days before Scott's bill became due Finlyson took it up, and gave in lieu of it another bill to the plaintiff, accepted by Lee, Strachan, & Co., but did not take back Scott's bill. Afterwards Lee, Strachan, & Co.'s bill not being paid, and Finlyson having become a bankrupt, the plaintiff brought this action against all the partners on Scott's bill, which remained in his hands, and obtained a verdict.

A rule being granted to show cause why this verdict should not be set aside, and a new trial granted,

Adair and Bond, Serjts., showed cause. They acknowledged that the action on the bill could not be supported, but contended that the plaintiff was entitled to retain his verdict, having paid money to the use of the defendants, at the special instance and request of a person authorized by them to receive and pay their debts.

Le Blanc and Lawrence, Serjts., for the rule argued, that it ought to have been shown, that the money was actually paid in discharge of a partnership debt; if it were paid when Finlyson had no right to pledge the credit of the partnership, it was not paid to the use of the partnership. But admitting that it was paid for a partnership debt, yet being paid without the knowledge and request of the defendants it could not be sufficient to raise an assumpsit. Finlyson had no authority to borrow money to pay their debt, or to contract for them without their consent. This case must be considered as already decided by Lord KENYON[1] in the King's Bench.

Adair replied, that in the case cited it was only holden that an action could not be maintained on the bill of exchange. The reason of which was, that the bill, being negotiable, and going into the hands of persons who might not know the consideration for which it was given, must be binding when given, or not at all. The authority of the drawer must be independent of any application of the money. But no such inconvenience could arise from the action for money paid. It is admitted that Finlyson paid the money of the plaintiff in discharge of a partnership debt; he had full authority from the other defendants to receive and pay: he therefore applied to the plaintiff for his note at their special instance and request.

Lord LOUGHBOROUGH. I was of opinion at the trial, that there was an equity in favor of the plaintiff, the money arising from his note being *de facto* applied for the benefit of the partnership, and the authority from the

[1] In a case between the Bank of England, plaintiffs, and the same defendants, in which the circumstances were the same as the present, there was a demurrer to the evidence which was not argued in court, but Lord KENYON at the trial gave it as his opinion, that the action on the bill could not be maintained.

other partners giving him power to discharge their debts. But I am now convinced that I was mistaken. Consider the nature of this transaction: Finlyson applies to Kilgour to discount the bill accepted by Scott, and in part of the discount takes a promissory note from him; Kilgour, before Scott's bill became due, changes it with Finlyson for another, accepted by Lee, Strachan, & Co., returns that, and takes Scott's bill back again. Now all this was carried on without any idea of the former partners being bound by it. On the 10th of October, long before the plaintiff's note was due, the defendant applied to Sterling Douglas & Co. to discount it, who accordingly did discount it, but received the money back again in part of payment of their debt owing from the partnership. When this note became due the plaintiff paid it to Sterling Douglas & Co., but at that time no debt was owing to them from the partnership; the payment therefore of the plaintiff was not a payment to the use of the partnership. Though the money raised by discounting his note before it was due was in fact paid in discharge of a partnership debt, yet he cannot follow the money through all the applications of it made by Finlyson.

HEATH and WILSON,[1] Justices, of the same opinion.

Rule absolute for a new trial.

JOHN VICKRIS TAYLOR (SURVIVING PARTNER OF FREEMAN HARTFORD, DECEASED) *v.* RICHARD HARE.

IN THE COMMON PLEAS, MAY 20, 1805.

[*Reported in* 1 *Bosanquet & Puller, New Reports*, 260.]

THIS was an action for money had and received, which came on to be tried before the Lord Chief Justice at the sittings after last Hilary term, when a verdict was found for the plaintiff for 425*l.*, subject to the opinion of the court upon the following case.

On the 12th of September, 1791, the defendant took out a patent for the invention of an apparatus for preserving the essential oil of hops in brewing. By articles of agreement, dated 5th of November, 1792 (which were set out at length at the end of the case), and made between the defendant of the one part, and the plaintiff and his said late partner of the other part, reciting the defendant's patent, and that it gave him the sole power, privilege, and authority of using, exercising, and vending his said invention for the term of fourteen years, the defendant granted to the plaintiff and his said late partner the privilege of making, using, and exercising the said invention for the residue of the said term of fourteen years, and in consideration thereof the plaintiff and his partner covenanted that they would

[1] Mr. Justice GOULD being absent.

The doctrine in this case to recognise it generally. There purchaser accrued benefit from the transaction he has no right to recover the money. Where there was an implied promise made on some body's use & behalf of the buyer would have he could not recover against the seller until the buyer have been actually interfered with. From that moment seller would have no right to demand or sell.

secure to be paid to the defendant during the said term an annuity of 100*l.*, and would give their bond for that purpose, and a bond was accordingly given, conditioned for the payment of the said annuity. The plaintiff and his said late partner used the apparatus (for the making and preparing of which they paid a distinct price) from the date of the said agreement until the 25th day of March, 1797, and during all that time regularly paid the said annuity to the said defendant. The defendant was not the inventor of the invention for which he obtained his patent. The invention was not new as to the public use and service thereof in England, but it was the invention of one Thomas Sutton Wood, and had been publicly used in England by said Wood and others before the defendant obtained his patent. But the patent had never been repealed. The amount of the annuity which they had paid was 425*l.* If the court should be of opinion that the plaintiff was entitled to recover back the money which was paid on the bond, the verdict was to stand. If the court should be of a contrary opinion, a nonsuit was to be entered.

Bayley, Serjt., for the plaintiff. To support the present action it is not necessary to prove that any imposition has been practised. If it appear that the plaintiff has received nothing in return for the money which he has paid, he is entitled to recover back his money in this form of action. He was induced to pay his money upon the supposition that the defendant had the power of communicating some privilege. But as it now appears that the defendant's invention was not new, and that the patent was therefore void, the consideration upon which the plaintiff paid his money has wholly failed, and the plaintiff has derived no benefit whatever. Where an estate is conveyed, the vendor professes to convey nothing but his title to that estate. But here the thing itself which was the subject of the agreement had no existence. It was the understanding of all parties that the defendant was entitled to a patent-right; but it now turns out that they were mistaken; the plaintiff therefore is entitled to recover the money which he has paid under a mistake. He had a right to make use of the invention without paying anything for it. The defendant has no right to the annuity, and indeed he has already failed in an action on the bond in which the validity of the patent was put in issue.

Sir James Mansfield, C. J. (stopping *Cockell*, Serjt., for the defendant). It is not pretended that any action like the present has ever been known. In this case two persons equally innocent make a bargain about the use of a patent, the defendant supposing himself to be in possession of a valuable patent-right, and the plaintiff supposing the same thing. Under these circumstances the latter agrees to pay the former for the use of the invention, and he has the use of it; *non constat* what advantage he made of it; for anything that appears he may have made considerable profit. These persons may be considered in some measure as partners in the benefit of this invention. In consideration of a certain sum of money the defendant per-

mits the plaintiff to make use of this invention, which he would never have thought of using had not the privilege been transferred to him. How then can we say that the plaintiff ought to recover back all that he has paid? I think that there must be judgment for the defendant.

HEATH, J. There never has been a case and there never will be, in which a plaintiff, having received benefit from a thing which has afterwards been recovered from him, has been allowed to maintain an action for the consideration originally paid. We cannot take an account here of the profits. It might as well be said, that if a man lease land, and the lessee pay rent, and afterwards be evicted, that he shall recover back the rent, though he has taken the fruits of the land.

ROOKE, J. I am of the same opinion.

CHAMBRE, J. The plaintiff has had the enjoyment of what he stipulated for, and in this action the court ought not to interfere, unless there be something *ex æquo et bono* which shows that the defendant ought to refund. Here both parties have been mistaken; the defendant has thrown away his money in obtaining a patent for his own invention; not so the plaintiff, for he has had the use of another person's invention for his money. In the case of Arkwright's patent, which was not overturned till very near the period at which it would have expired, very large sums of money had been paid; and though something certainly was paid for the use of the machines, yet the main part was paid for the privilege of using the patent-right, but no money ever was recovered back which had been paid for the use of that patent. I am therefore of opinion that judgment of nonsuit should be entered.

Judgment of nonsuit.

FEISE *v.* PARKINSON.

IN THE COMMON PLEAS, NOVEMBER 18, 1812.

[*Reported in* 4 *Taunton*, 640.]

THIS was an action upon a policy, at and from Hamburgh, or any port or ports in the Elbe, to London, or any other port or ports of the United Kingdom. Upon the trial of this cause at Guildhall, at the sittings after the last Michaelmas term before MANSFIELD, C. J., the plaintiff proved the subscription, loss, and interest; and the defendant rested his case upon a misrepresentation made to the first underwriter at the time of effecting the policy, to whom, as it was sworn by the broker, the plaintiff had stated that the ship had both an English licence and a French imperial licence, whereas the fact was, that the ship had an English licence, and a French pass from Cuxhaven, which enabled her to come down the Elbe from Hamburgh, and put to sea without molestation at Cuxhaven, but by no means operated as

a licence to her to trade with England; and it was sworn that the circumstance of having a French imperial licence made a considerable difference in the amount of the premium of insuring such a voyage at the time when this policy was effected. The jury found a verdict for the defendant.

Shepherd, Serjt., for the plaintiff.

Lens, Serjt., for the defendant.

GIBBS, J. Where there is a fraud there is no return of premium, but upon a mere misrepresentation without fraud, where the risk never attached, there must be a return of premium. This business is conducted on the part of the assureds, with the utmost imprudence; these transactions are done by parol between the plaintiff and defendant, the broker only present, and on which side his interest leans, if he be dishonest, all know; as long as it is the law, we must admit it; but this is one, among other proofs, of the mischievous tendency of admitting parol evidence of what passes at the time of making written instruments, to control them. It is clear that the plaintiff is not entitled to a new trial on the first ground. I think it equally clear that the plaintiff is entitled to enter his verdict on the count for money had and received for the premium, but as the return of premium was not claimed at the trial, that cannot be done without the defendant's consent. Upon the other counts the verdict must be for the defendant; if the defendant will not consent, the court must grant a new trial generally.

On the following day, Lens, after consulting his clients, consented to the plaintiff's taking a verdict for the premium; and that branch of the rule was therefore made absolute.

M'CULLOCH *v.* ROYAL EXCHANGE ASSURANCE COMPANY.

AT NISI PRIUS. BEFORE LORD ELLENBOROUGH, C. J., JUNE 14, 1813.

[*Reported in* 3 *Campbell*, 406.]

THIS was an action of debt for money had and received, to recover the sum of 1260*l.* as a return of premium upon a policy of insurance executed by the defendants.

The case came on upon admissions, which stated:—

"That on the 21st of August, 1812, a policy of insurance was effected by Messrs. Amyand, Cornwall, & Co. with the defendants, by the order and on account of the plaintiff, for the sum of 7000*l.*, upon the ship Duke of Kent, and her freight, being 4000*l.* upon the ship, and 3000*l.* on freight, on a voyage from Saint Domingo to the port of London, at a premium of 21*l.* per cent.

"That a return of premium for the ship's sailing armed with 12 guns, and arrival as stipulated by the policy, has been made by the defendants, leaving the sum of 1260*l.* as the net premium paid to them for effecting the said policy.

"That in the month of May, 1809, the said ship proceeded upon a voyage to the West Indies, from the port of London; and that Mr. Richard Gardiner was then the sole owner thereof in the register of the port of London, and that he is now the sole registered owner in the said register in the said port, and that he has never transferred his property in the said ship to any person, nor has the same ever been transferred by his consent or authority.

"That the said ship arrived at Martinique, where she took in a cargo on freight for Europe, and sailed from thence on the 1st of August, 1809.

"That having met with damage on the said last-mentioned voyage, the said ship put into the harbor of St. John's, Antigua, in distress; and, after being surveyed by a warrant from the Vice-Admiralty Court of that island, she was condemned to be sold as being unfit to be repaired; and was accordingly sold, by virtue of an order of the said Vice-Admiralty Court, to Matthew King.

"That Matthew King afterwards obtained from the proper officer of the customs of the said island a new colonial register for the ship, and remained in possession of her till September, 1811, during which time he caused her to be repaired at a great expense, conceiving that he had obtained by virtue of the sale hereinbefore mentioned a full and complete title to the said ship.

"That in September, 1811, the said Matthew King sold the said ship to the plaintiff at Guadaloupe, for the sum of $14,500, and executed a regular bill of sale of her to him, at which time, and till some days after the arrival of the ship in England (as hereinafter mentioned), the plaintiff had no notice or knowledge of any adverse claim or title to the said ship, but on the other hand was fully convinced that he had acquired a good and sufficient title thereto.

"That the plaintiff, after the purchase of the said ship, and while he retained the possession thereof, expended the sum of 3346*l.* in various disbursements for the use of the said ship, and for the outfit of the voyage in question.

"That the plaintiff employed the said ship in a coasting voyage to the Spanish Main; and in June, 1812, he procured a freight for her at St. Domingo for London, being the voyage insured by the policy in question, where she arrived on or about the 20th of September last, and safely delivered her cargo; and the freight of the said cargo, amounting to about the sum of 2867*l.* 10*s.* 11*d.*, has been duly paid to the plaintiff.

"That after the arrival of the said ship, and the delivery of her cargo, the said Richard Gardiner obtained possession of the said ship under an

Admiralty warrant, and now seeks to recover the amount of the freight so paid to the plaintiff."

Scarlett, Campbell, and *Spankie* for the plaintiff.

Garrow, A. G., *Park,* and *Bosanquet* for the defendants.

Lord ELLENBOROUGH. In Routh *v.* Thompson, a loss had happened, and an action was brought against the underwriters to recover the sum insured. They resisted the demand on the ground that there was no insurable interest. As they denied their liability on the policy, they were not, under these circumstances, allowed to retain the premium. But here the voyage has been performed, and the ship has arrived in safety. The freight has been earned and paid. It strikes me as now too late to rip up the matter, and to say you had no insurable interest. You might have rescinded the contract before the event: but after that has been determined in favor of the underwriters, it does not lie in your mouth to tell them they never were liable, and that the premium was a payment without consideration. I am perfectly clear the plaintiff has no right to recover. It would place underwriters in a very awkward situation, if after the safe arrival of the ship, the assured could come to them and say, "We had no legal title to her; on account of some secret transactions which you had no means of investigating, we had no insurable interest; and you must pay us back the premium which you imagined you had earned."

Plaintiff nonsuited.

SMOUT *v.* MARY ANN ILBERY.

IN THE EXCHEQUER, MAY 23, 1842.

[*Reported in* 10 *Meeson and Welsby,* 1.]

DEBT for goods sold and delivered, and on an account stated.

Pleas, first, except as to £6 7*s.*, parcel, etc., *nunquam indebitatus;* secondly, except as to the said sum of £6 7*s.*, parcel, etc., payment; thirdly, as to the sum of £6 7*s.*, parcel, etc., payment into court of that sum, and *nunquam indebitatus ultra.* The replication took issue on the first plea, denied the payment alleged in the second, and accepted the £6 7*s.*, in satisfaction as to so much of the debt demanded.

At the trial before GURNEY, B., at the Middlesex sittings in Michaelmas term, 1841, it appeared that the plaintiff was a butcher, and the defendant the widow of James Ilbery, who left England for China in May, 1839, and was lost in the outward voyage, on the 14th October, 1839. The news of his death arrived in England on the 13th of March, 1840. The plaintiff had supplied meat to the family before Mr. Ilbery sailed, and during his voyage, and the supply continued down to the time of the news of his death, and even afterwards. Upon the 14th October, 1839, the day of

Mr. Ilbery's death, the amount of the debt was £52 13*s.* 11*d.* Between that day and the arrival of the news of the death, meat had been supplied to the amount of £19 9*s.*; and after that, the supply amounted to £6 7*s.*

This action was brought for these two sums (together) £25 16*s.* The defendant paid £6 7*s.* into court, and relied on a payment of £20, as discharging her from the plaintiff's claim for meat supplied after the date of her husband's death; and the counsel for the defendant gave in evidence the following receipt signed by the plaintiff, dated the 30th March, 1840: "Received of Mrs. Ilbery, £20." The plaintiff insisted that the £20 had been paid generally on account, and must be applied as a payment by the executors in part satisfaction of the debt of the husband; and called Mr. Dollman, the executor. From his evidence it appeared, that Mr. Ilbery had left the management of his affairs in his hands, and whenever Mrs. Ilbery wanted money, she had it from him. Dollman and Mrs. Ilbery were, by Ilbery's will, appointed executor and executrix; but he alone proved the will, on the 21st March, 1840, power being reserved in the usual way for her to prove also. On the 28th March, Mr. Dollman gave Mrs. Ilbery five or six cheques, and among others, one for £20, payable to the plaintiff. This cheque she paid to the plaintiff, and took his receipt as above mentioned.

At that time it was supposed that Ilbery's estate was solvent. It turned out to be otherwise; and Dollman, who was engaged with him in the adventure to China, had become bankrupt.

The question left to the jury was, whether the £20 was paid on the executorship account, or on the account of Mrs. Ilbery only, and in discharge of that debt which (on both sides, as well as in the learned judge's opinion) was taken to have been due from her.

The jury found that it was paid on the executorship account, and gave their verdict for the plaintiff for £19 9*s.*, the price of the meat supplied between the day of Mr. Ilbery's death and the arrival of the intelligence of it. A rule having been obtained in Michaelmas term to show cause why that verdict should not be set aside, and a new trial had, on the ground that the defendant was not liable for the meat supplied after, but before she had any knowledge of, her husband's death.[1]

Hindmarch.[2] The defendant having accepted the meat supplied to her, and used it, there is a contract implied by law on the part of some person to pay the price of the meat; and as the husband was dead, and she had no authority to bind his executors, a contract must be implied on her part to pay for the meat supplied to her after her husband's death; and she is not to be allowed to get rid of her liability by saying, that at the time she gave the orders or accepted the goods, she thought her husband was alive,

[1] This point was not made at the trial, and therefore there could be no motion for a nonsuit.

[2] A portion of the argument relating to questions of agency has been omitted. — Ed.

and that she was contracting on his behalf. In Thomson *v.* Davenport,[1] where, at the time of making a contract of sale, the party buying the goods represented that he was buying them on account of persons resident in Scotland, but did not mention their names, and the seller did not inquire who they were, but afterwards debited the party who purchased the goods; it was held that the seller might afterwards sue the principals for the price. There the vendor actually credited the agent, and yet the principal was held liable. The general principle is, that the law creates an implied contract from the receipt of the goods. [ALDERSON, B. — Here each party thought the husband was responsible.] That can make no difference, for it is clear that there could be no contract between the plaintiff and the dead man; and there was no contract by the executor with the plaintiff. There is a fallacy on the other side, in assuming that there was a prior continuing contract between the husband and the plaintiff, respecting the supply of goods to the wife. An action for goods sold and delivered is not necessarily founded upon a contract antecedent to the delivery of the goods; it may be, and generally is, founded upon the implied contract that the party will pay the price or value of the goods delivered and accepted by him; and there are as many implied contracts as there are parcels of goods delivered and accepted. If there was no prior contract at all in the present case (which it is clear there was not), then the moment each parcel of goods was delivered and accepted, the law implied a contract by the defendant, who received and accepted them, to pay the price.

Erle, in support of the rule. — The contract in this case was a continuing contract, which the parties, in Blades *v.* Free, failed to make out. This was a course of dealing which was continued in consequence of, and as part of, the former contract. An agent ought not to be held liable where he enters into a contract as agent, *bona fide* supposing himself to have authority, when it turns out that he had none, through an event which had happened, but of which he was not cognizant, and had no means of knowing. The evidence here was, that goods were supplied by the plaintiff to the husband during his residence here, and were afterwards continued to be supplied to his wife after he left this country; there is clearly no implied contract arising from this state of things, that she would pay for them. Suppose the case of the husband and wife having both gone abroad, and having left a housekeeper in charge of the house and the children, and meat is supplied to the house, and the husband and wife are both drowned, is the housekeeper to be liable, because she ordered the meat for the use of the house? [ALDERSON, B. — In the same way it may be said, if a bachelor leaves a housekeeper in possession of his house, and goes abroad, and dies, is the housekeeper to be liable?] In Polhill *v.* Walter, there was the making of a representation which the party making it knew to be untrue. If Ilbery had not died, he would have been clearly liable, and the account was in his

[1] 9 B. & C. 78; 4 Man. & R. 110.

name. As to the argument of there being an implied contract, that merely amounts to this, that a party to whom goods are delivered is liable for them; but that is where there is nothing to show that any other person was responsible. The case of Blades *v.* Free has nothing to do with the present. *Cur. adv. vult.*

The judgment of the Court was now delivered by

ALDERSON, B. This case was argued at the sittings after last Hilary term, before my Brothers GURNEY, ROLFE, and myself. The facts were shortly these. The defendant was the widow of a Mr. Ilbery, who died abroad; and the plaintiff, during the husband's lifetime, had supplied, and after his death had continued to supply, goods for the use of the family in England. The husband left England for China in March, 1839, and died on the 14th day of October, in that year. The news of his death first arrived in England on the 13th day of March, 1840; and the only question now remaining for the decision of the court is, whether the defendant was liable for the goods supplied after her husband's death, and before it was possible that the knowledge of that fact could be communicated to her. There was no doubt that such knowledge was communicated to her as soon as it was possible; and that the defendant had paid into court sufficient to cover all the goods supplied to the family by the plaintiff subsequently to the 13th March, 1840.

We took time to consider this question, and to examine the authorities on this subject, which is one of some difficulty. The point, how far an agent is personally liable who, having in fact no authority, professes to bind his principal, has on various occasions been discussed. There is no doubt that in the case of a fraudulent misrepresentation of his authority, with an intention to deceive, the agent would be personally responsible. But independently of this, which is perfectly free from doubt, there seem to be still two other classes of cases, in which an agent who without actual authority makes a contract in the name of his principal, is personally liable, even where no proof of such fraudulent intention can be given. First, where he has no authority, and knows it, but nevertheless makes the contract as having such authority. In that case, on the plainest principles of justice, he is liable. For he induces the other party to enter into the contract on what amounts to a misrepresentation of a fact peculiarly within his own knowledge; and it is but just, that he who does so should be considered as holding himself out as one having competent authority to contract, and as guaranteeing the consequences arising from any want of such authority. But there is a third class, in which the courts have held, that where a party making the contract as agent *bona fide* believes that such authority is vested in him, but has in fact no such authority, he is still personally liable. In these cases it is true, the agent is not actuated by any fraudulent motives; nor has he made any statement which he knows to be untrue. But still his liability depends on the same principles as

before. It is a wrong, differing only in degree, but not in its essence, from the former case, to state as true what the individual making such statement does not know to be true, even though he does not know it to be false, but believes, without sufficient grounds, that the statement will ultimately turn out to be correct. And if that wrong produces injury to a third person, who is wholly ignorant of the grounds on which such belief of the supposed agent is founded, and who has relied on the correctness of his assertion, it is equally just that he who makes such assertion should be personally liable for its consequences.

On examination of the authorities, we are satisfied that all the cases in which the agent has been held personally responsible, will be found to arrange themselves under one or other of these three classes. In all of them it will be found, that he has either been guilty of some fraud, has made some statement which he knew to be false, or has stated as true what he did not know to be true, omitting at the same time to give such information to the other contracting party, as would enable him equally with himself to judge as to the authority under which he proposed to act.

Of the first, it is not necessary to cite any instance. Polhill *v.* Walter[1] is an instance of the second; and the cases where the agent never had any authority to contract at all, but believed that he had, as when he acted on a forged warrant of attorney, which he thought to be genuine, and the like, are instances of the third class. To these may be added those cited by Mr. Justice Story, in his book on Agency, p. 226, note 3. The present case seems to us to be distinguishable from all these authorities. Here the agent had in fact full authority originally to contract, and did contract in the name of the principal. There is no ground for saying, that in representing her authority as continuing, she did any wrong whatever. There was no *mala fides* on her part, no want of due diligence in acquiring knowledge of the revocation, no omission to state any fact within her knowledge relating to it; and the revocation itself was by the act of God. The continuance of the life of the principal was, under these circumstances, a fact equally within the knowledge of both contracting parties. If, then, the true principle derivable from the cases is, that there must be some wrong or omission of right on the part of the agent, in order to make him personally liable on a contract made in the name of his principal, it will follow that the agent is not responsible in such a case as the present. And to this conclusion we have come. We were, in the course of the argument, pressed with the difficulty, that if the defendant be not personally liable, there is no one liable on this contract at all; for Blades *v.* Free[2] has decided, that in such a case the executors of the husband are not liable. This may be so: but we do not think that if it be so, it affords to us a sufficient ground for holding the defendant liable. In the ordinary case of a wife who makes a contract in her husband's lifetime, for which the husband

[1] 3 B. & Ad. 114. [2] 9 B. & C. 167; 4 Man. & R. 282.

is not liable, the same consequence follows. In that case, as here, no one is liable upon the contract so made.

Our judgment, on the present occasion, is founded on general principles applicable to all agents; but we think it right also to advert to the circumstance, that this is the case of a married woman, whose situation as a contracting party is of a peculiar nature. A person who contracts with an ordinary agent contracts with one capable of contracting in his own name; but he who contracts with a married woman knows that she is in general incapable of making any contract by which she is personally bound. The contract, therefore, made with the husband by her instrumentality, may be considered as equivalent to one made by the husband exclusively of the agent. Now, if a contract were made on the terms, that the agent, having a determinable authority, bound his principal, but expressly stipulated that he should not be personally liable himself, it seems quite reasonable that, in the absence of all *mala fides* on the part of the agent, no responsibility should rest upon him; and, as it appears to us, a married woman, situated as the defendant was in this case, may fairly be considered as an agent so stipulating for herself; and on this limited ground, therefore, we think she would not be liable under such circumstances as these.

For these reasons, we are of opinion that the rule for a new trial must be absolute; but as the point was not taken at Nisi Prius, we think the costs should abide the event of the new trial.

Rule absolute accordingly.

HIGGS *v.* SCOTT.

In the Common Pleas, January 16, 1849.

[*Reported in* 7 *Common Bench Reports*, 63.]

The plaintiff held premises as tenant from year to year to the defendant. After the commencement of the tenancy, the defendant mortgaged her term in the premises to a Mrs. Hardy. The interest being in arrear, the mortgagee, in the beginning of the year 1848, gave the plaintiff notice not to pay his rent to the defendant. Upon receipt of this notice, the plaintiff went with one Hawkins, who collected the defendant's rents, to one Hodgkinson, whom Hawkins represented to be the defendant's attorney, and gave him notice of Mrs. Hardy's claim. In consequence of what passed upon that occasion, the plaintiff, on the 18th of February, 1848, paid Hawkins the amount of two quarters' rent, less the property-tax. After this, a distress was put in upon the plaintiff's premises, under which the plaintiff was compelled to pay the two quarters' rent over again to Mrs. Hardy, the mortgagee. The present action was brought to recover back the money

so paid. — the first count being founded upon an indemnity given by Hodgkinson in the defendant's name, the second for money had and received.

In support of his case under the first count, the plaintiff called Hodgkinson; but the Lord Chief Justice, before whom the cause was tried, said he would allow the plaintiff to prove notice given of Mrs. Hardy's claim to Hodgkinson, but not that he had given the indemnity. The plaintiff then relied upon the facts above stated, as entitling him to recover back as money had and received, the two quarters' rent he had paid to the defendant after the date of the notice.

On the part of the defendant, it was objected, first, that this was, in effect, an attempt to try a question of title in an action for money had and received; secondly, that the payment having been voluntarily made, with full knowledge of the facts, the plaintiff could not recover it back.

A verdict having been found for the defendant, with leave to the plaintiff to move to enter a verdict for 19*l.* 2*s.* 6*d.*, if the court should be of opinion that the evidence as to the indemnity was improperly rejected, or that the plaintiff was entitled to recover under the second count.

Byles, Serjt., for the plaintiff.

Cresswell, J. I am of opinion that there is no ground for impeaching the decision of the Lord Chief Justice as to the rejection of Hodgkinson's evidence. Seeing the purpose for which it was tendered, viz., to prove a contract, to make which there was no evidence of Hodgkinson's authority, it was properly rejected.

Then, as to the other point, — the plaintiff, when he paid the money, knew all the facts. He was informed of them; and there was nothing to show he had not received correct information. When a party is told that certain deeds have been executed, he knows the fact, although he does not see the deeds. The whole case on the part of the plaintiff was, that he knew the fact of the mortgagee's claim; and therefore he asked for an indemnity, though he did not, unfortunately for him, get an effectual one. He paid the rent as a thing he was bound to pay, indicating no intention to reclaim it. There was no misrepresentation of the facts, no fraud on the part of the defendant in receiving the money, and consequently no ground upon which the plaintiff can be entitled to recover it back.

V. Williams, J. I am of the same opinion. I am not disposed to throw any doubt upon the case of Kelly *v.* Solari, confirmed, as it is, by Bell *v.* Gardiner. But I think the present case falls within the ordinary rule, that money paid with full knowledge of all the circumstances cannot be recovered back in an action for money had and received.

Maule, J. I am of the same opinion. That the payment was made with full knowledge of all the facts on both sides, was, I think, strongly evidenced by the receipt that was given.

Wilde, C. J. The general result of the evidence in this case, is, that

the defendant has received from the plaintiff a sum of money which she was not entitled to receive: and, in such a case, one would look very anxiously to see if the law would not warrant his recovering it back. But it is of infinitely more importance that general principles should be adhered to. I must confess I can see no foundation for the plaintiff's claim. The recovery back of money once parted with, is always attended with difficulty.

With respect to the evidence, — what passed with Hodgkinson was admitted down to the point at which it tended to prove a contract. It was then objected that Hodgkinson had no authority from his client to enter into a contract of indemnity for her. Upon that, the question for my decision was, whether or not there was evidence of any authority in him to contract for the defendant. I think there was not.

As to the other part of the case, it was an extremely simple one. The plaintiff is tenant to the defendant. A third person gives notice of a claim adverse to the defendant, stating the grounds of her claim minutely and correctly, viz., that the premises have been assigned to her by way of mortgage, and that the interest is in arrear. The landlady insists that *she* is entitled to the rent. Of what is the plaintiff ignorant? It does not appear that any misrepresentation of fact was made by the defendant. The plaintiff yields to the defendant's claim of right, and pays her the money. It is, therefore, the simple case of a notice of adverse claims, to one of which the plaintiff elects to give the preference. The case, therefore, clearly falls within the general principle, — that money paid with full knowledge of all the facts, cannot be recovered back.

Rule refused.

ABRAHAM VAN DEUSEN *et al. v.* JAMES BLUM *et al.*

In the Supreme Judicial Court of Massachusetts, September Term, 1836.

[*Reported in* 18 *Pickering*, 229.]

This was an action of debt. The declaration contained two counts upon a special contract under seal, a third upon a *quantum meruit* for labor performed, and a fourth upon a *quantum valebant* for materials furnished. The defendant Blum was defaulted; the other defendant, Thouvenin, appeared, and to the first two counts he pleaded *non est factum*, and to the third and fourth, *nil debet*.

At the trial, before Morton, J., the plaintiffs produced the contract, purporting to be between themselves of the one part, and Blum and Thouvenin of the other part. Blum and Thouvenin were partners, and were so described in the contract. The plaintiffs had duly executed the

contract, and Blum also had executed it by signing the company name "J. C. Thouvenin & Co.," and annexing a seal. There was no evidence that he had any authority to execute the contract in behalf of Thouvenin, or that Thouvenin was present at the execution or ever ratified it.

The judge ruled, that the instrument could not go in evidence to the jury as the deed of Thouvenin.

The contract was for building a dam by the plaintiffs for Blum and Thouvenin, across the Housatonic River; which was a purpose within the scope of the partnership business. The plaintiffs offered to prove that they built the dam and furnished the materials therefor, and they claimed against Thouvenin, under the third and fourth counts, what their work and materials were worth. Thouvenin objected to the admission of this evidence, and contended that there being an express contract executed by the plaintiffs and Blum, and that contract being in force and binding upon Blum, the plaintiffs' remedy was on that instrument alone.

But the judge ruled, that the plaintiffs might, notwithstanding that contract, recover under the third and fourth counts, upon an implied promise, for all the materials furnished and labor performed before the dissolution of the partnership.

Thouvenin and Blum dissolved partnership on the 10th of November, 1832, and all the partnership property was conveyed to Blum, and he agreed to pay all the partnership debts. The dam was not finished until after the 10th of November, and for the work done previously to that day the jury found a verdict against Thouvenin.

The questions arising upon these facts were reserved for the consideration of the whole court.

Dwight, *Byington*, and *Tucker*, for the defendant.

Bishop and *Sumner*, for the plaintiff.

MORTON, J., delivered the opinion of the Court. Debt, as well as assumpsit, will lie on a *quantum meruit* or a *quantum valebant*.[1] Union Cotton Manufactory *v.* Lobdell.[2] Hence these counts may well be joined with counts upon a specialty. Smith *v.* First Congr. Meetinghouse in Lowell.[3]

It was long doubted, whether a man, who performed work in consequence of a special contract, but not in conformity to it, could recover for the services rendered and materials found. There are many and conflicting authorities on the subject. They have all been carefully examined and compared, and the rule established by our court, as we think, according to the principles of justice and the weight of authority. He who gains the labor and acquires the property of another, must make reasonable compensation for the same. Hayward *v.* Leonard;[4] Smith *v.* First Congr. Meetinghouse in Lowell;[5] Munroe *v.* Perkins;[6] Brewer *v.* Tyringham.[7]

[1] 1 Chit. Pl. 107; 2 Wms's Saund. 117 *b*, note.
[2] 13 Johns. 462.
[3] 8 Pick. 178.
[4] 7 Pick. 181.
[5] 8 Pick. 178.
[6] 9 Pick. 298.
[7] 12 Pick. 547.

The general authority derived from the relation of partnership does not empower one partner to seal for the company or to bind them by deed. It requires special power for this purpose. See Cady *v.* Shepherd,[1] and the cases there cited. Here was no evidence of any previous authority or subsequent ratification. The sealed instrument executed by one partner in the name of the firm might bind him, but could not be obligatory upon the company. And although the plaintiffs might have had a remedy upon the contract against the party who executed it, yet they were not bound to rely upon him alone.

The services never were rendered either in conformity to or under such an agreement. The plaintiffs undertook to execute a contract between themselves and the company. But there being no such contract in existence, they are left to resort to their equitable claim for their labor and materials. So far as these benefited the company, the plaintiffs are entitled to recover against them.

Judgment on the verdict.

BOND *v.* AITKIN.

IN THE SUPREME COURT OF PENNSYLVANIA, DECEMBER TERM, 1843.

[*Reported in* 6 *Watts & Sergeant*, 165.]

ERROR to the Common Pleas of Delaware county.

This was an action of debt brought by Charles Bond against John Aitkin and James Aitkin, trading under the firm of John & James Aitkin, on the following note: —

Six months after date we promise to pay to Charles Bond or order four hundred dollars, with five per cent interest, without defalcation, for value received. Witness our hands and seals, this 1st day of October, 1836.

JOHN & JAMES AITKIN. [L. S.]

The plaintiffs declared in one count against the defendants as partners in a sealed instrument alleged to have been executed by them, and in another against them as partners for money lent. James Aitkin pleaded payment with leave, etc. and *non est factum*, to the first count. Judgment by default was entered against John.

The plaintiff called a witness, who testified that he called on James Aitkin, and presented to him the note in suit for payment. Witness asked him if he had signed it. He replied that he had not, that John had signed it; that he did not know it at the time, but if he had, he would have been perfectly satisfied; the money was got for the firm and went into the firm. Witness then asked him for his individual note, which he refused, saying

[1] 11 Pick. 400.

he preferred it should be sued out as a partnership claim, that the neighbors might know it was not his fault. He said he could not pay the amount of the note at that time, but if he could make collections, it should be paid by the 1st of October: he had left his brother to settle the books and thought he had paid it. Witness told him he thought he would have to pay the note, when he replied he thought the note as good as if he gave his individual note. He admitted that he and John had been partners.

Another witness proved that the body of the note and signature were in the handwriting of John Aitkin. That the defendants were in partnership for several years, John being the active partner. The partnership was dissolved about the year 1839. On the dissolution the property remained with John, who was to pay the debts of the firm.

BELL, President, charged the jury as follows: —

The plaintiff declares in two counts, one on a bill single alleged to be executed by John and James Aitkin, dated October 1, 1836, to secure the payment of $400. To this the defendant, James Aitkin, pleads *non est factum;* and this plea raises the question whether the obligation is in truth the deed of John and James, as the plaintiff argues. It appears the bill obligatory was signed by John alone, and although he used the name of his partner as one of a firm, it is not binding on James; for, generally speaking, one partner cannot bind another by specialty or instrument under seal, sealed instruments not being such as are used in transacting partnership affairs. The plaintiff cannot, therefore, recover on his first count, for he has failed to prove the bill single declared on is the deed of the defendants.

But the plaintiff, in a second count, declares against John and James Aitkin, as partners, for money loaned to them. On the evidence, the jury can entertain little or no doubt that the money sought to be recovered was borrowed from the plaintiff on the partnership account and applied to partnership purposes, and so became the joint debt of both the partners, though actually borrowed but by one of them. *Prima facie*, therefore, both would be liable in this action. But in answer to this statement of the plaintiff's claim, the defendants set up the bill single given in evidence by the plaintiff under his first count, as a bar to his recovery on the second. This bill single must be taken as executed by John Aitkin alone; for though signed in the name of the firm, it is good against him, and him alone. But it is the undoubted rule in Pennsylvania, that if the creditor of a firm accept the obligation of one of the partners for the firm debt, the original claim is merged and extinguished in the new security, and the creditor cannot afterwards have recourse to the first liability, as is attempted here.

But it is shown that James Aitkin promised to pay this debt subsequently to the execution of the bill single, and if this were an action against him alone, I incline to the opinion that the plaintiff might re-

cover on this promise, as based on a subsequent consideration. But this is an action against two, John and James; and before the plaintiff can recover, he must show a joint liability on the part of the defendants to answer. In this he has failed. I am, therefore, of opinion the plaintiff is not entitled to recover in this action, and your verdict ought to be for the defendants.

The plaintiff excepted to the charge, and assigned the following errors: —

1. The court erred in charging that the bill single executed by John Aitkin was an extinguishment of the joint debt of both defendants.

2. In charging that the plaintiff could not recover upon the second count of the declaration.

3. In charging that the plaintiff could not recover upon James Aitkin's promise to pay.

4. In charging that there was no joint liability.

5. In charging that the bill single was void as to James Aitkin.

Edwards and *B. Tilghman* for plaintiff in error.

Lewis for defendants in error.

The opinion of the Court was delivered by

SERGEANT, J. The question arising in this case has undergone a thorough discussion in the two late cases of Gram *v.* Seton,[1] and Cady *v.* Shepherd,[2] where all the authorities are examined, and the principle is settled that a partner may bind his copartner by a contract under seal, in the name and for the use of the firm, in the course of the partnership business, provided the copartner assents to the contract previously to its execution, or afterwards ratifies and adopts it; and this assent or adoption may be by parol. And we are satisfied that the rule is founded on principles of justice and policy, and supported by the general tenor of the adjudged cases in this country and in England. The only question in the present case is, whether there is any evidence to go to the jury to show that James Aitkin assented to the giving of the sealed bill in the name of the firm, before or at the time of its execution, or afterwards ratified it; and we think there is. The admissions made by him in the conversation with Carter, if believed, in connection with the fact that the money was got for the firm and went to its use, are evidence to go to the jury. He said that though he did not know of it at the time it was given, yet, if he had, he would have been perfectly satisfied; if he could make collections, he would pay it in October. He repeatedly desired it should be sued as a partnership claim, and declared the note was as good as if he gave his individual note. This and the whole tenor of the conversation tend strongly to the inference that he had authorized the giving of it; and we think the evidence ought to have been left to the jury to say whether such authority was given, or whether the defendant subsequently ratified the instrument.

On the additional count, we think the plaintiff has not shown a right to

[1] 1 Hall, 262. [2] 11 Pick. 400.

recover. Where the bond of one of the partners is taken for an antecedent partnership debt, it may be considered either as payment and extinguishment of such debt, or only a collateral security, according to the nature of the transaction and the circumstances attending it. Wallace *v.* Fairman.[1] But where there is no antecedent debt, but the bond of one partner is taken at the time money is loaned to the partnership, and as the consideration for loaning the money, it can hardly be treated as a collateral security. It must be considered as all one transaction, and the bond as the only security contemplated; unless, perhaps, there were strong and positive evidence to show an express agreement to the contrary by all parties. If so, then in this case the bond was the only debt; the plaintiff, if he recovered at all, must recover on it, and not on the money counts. And as there was no implied contract by both, so the express promise proved was only by one; and, therefore, we are of opinion the charge of the court below was correct, that the plaintiff could not recover on the additional count.

Judgment reversed, and a venire de novo awarded.

KELLEY *v.* LINDSEY.

In the Supreme Judicial Court of Massachusetts, October Term, 1856.

[*Reported in* 7 *Gray*, 287.]

Action of contract on a check payable to the plaintiff and signed "Benjamin Lindsey, by George G. Coffin." There were also counts for money lent, and for money had and received.

At the trial in the Court of Common Pleas, before Morris, J., the evidence tended to show "that Coffin obtained the money of the plaintiff for the use of the defendant, and that it was applied for the benefit of the defendant in his business; that Coffin was, at the time the check was drawn and dated, the financial agent and confidential clerk of the defendant, and had charge of his money affairs, while the defendant was engaged personally as editor of a newspaper; that Coffin had, on various occasions, under the direction and with the assent of the defendant, accepted drafts drawn on the defendant, drawn orders on tradesmen, and borrowed and hired money of various persons for the use of the defendant and in the defendant's name, and given checks, signed as above, to the persons from whom the money was had; that he had, for the defendant, accepted drafts drawn on the defendant, which drafts had been left at the banks for collection, and been paid; and that orders upon tradesmen, signed as above, payable to operatives in the defendant's employ, had

[1] 4 Watts, 378.

been accepted and paid by the drawees, and allowed by the defendant in settlement of the accounts of such tradesmen."

It was admitted by the plaintiff that a rate of interest, greater than was allowed by law, was reserved in this check; that a sum equal to three times such excess should be deducted, according to the statute; and that the check was in fact made and signed six weeks earlier than its date.

It did not appear that specific authority had been given by the defendant to Coffin to borrow from the plaintiff, or that express authority had been given to procure money of him at more than the legal rate of interest. But there was evidence to show that on one occasion the defendant was informed by Coffin that the defendant's funds were insufficient to meet his liabilities, and that the money could not be obtained anywhere at the legal rate.

The defendant requested the court to instruct the jury, "that if Coffin borrowed this money without authority, the mere fact that the money so borrowed was appropriated to the payment of the defendant's notes, or other indebtedness or business expenses, would not authorize the jury to find for the plaintiff in this action."[1]

The court declined to instruct the jury as requested.

The jury found a verdict for the plaintiff, and the defendant alleged exceptions.

L. F. Brigham for the defendant.

J. F. Dearborn for the plaintiff.

DEWEY, J. The remaining instruction was objectionable, and should not have been given. If Coffin had no authority to borrow money on account of the defendant, to expend in his business and to pay his debts, the money advanced for that purpose, though so applied, created no debt against the defendant. No one can thus make himself a creditor of another by the unsolicited payment of his debts; and it is not enough to create a liability, that the defendant had the benefit of the money, by reason of its being expended in his business or in the payment of his debts. There must have been shown some authority to make such advance or payment of money, proceeding from the defendant, in addition to the mere fact of its being applied for his benefit, in order to charge him with the same in a suit at law. For this reason, the court are of opinion that the verdict must be set aside and a *New trial had.*

[1] Only so much of the case is given as relates to this charge. — ED.

DEERY *v.* HAMILTON.

IN THE SUPREME COURT OF IOWA, JUNE 17, 1875.

[*Reported in* 41 *Iowa Reports*, 16.]

ACTION in chancery to quiet the title to certain lands. There was a decree granting the relief prayed for in the petition. The facts of the case appear in the opinion. Defendant appeals.

Beach & Hurd for appellant.

H. T. McNulty and *John Deery* for appellee.

BECK, J. Catharine Scully, the executrix of the estate of John Scully, deceased, appointed by will, borrowed of defendant $3000, which was secured by a conveyance absolute in form, executed by her upon the lands of the decedent which are involved in this suit. The petition denies that defendant acquired any right under the deed, and prays that it may be cancelled. Defendant makes no claim of title under the instrument, but insists that he holds a valid lien thereunder in the nature of a mortgage, to secure the payment of $3000 and the interest due thereon. The evidence shows that the executrix borrowed of defendant the sum of $3000 for the use of the estate, and secured the same by an absolute deed. Upon the execution of the instrument defendant advanced $2430; $570 being retained as interest upon the $3000 for two years. The money so secured by her was used in paying claims against the estate, and expenses incurred by the executrix. Subsequently the executrix died and plaintiff was appointed administrator *de bonis non*. He now insists that the money was borrowed, and the deed executed without authority of law. The defendant claims that the transaction is authorized under the terms of the will, and that it was reported to and approved by the Circuit Court, in discharge of its probate powers. Unless authority is found therefor, it cannot be claimed that the transaction will bind the estate, for unless especially authorized either by the will or the law, the executrix possessed no power to do such acts.

1. The clause in the will which defendant claims authorizes the borrowing of the money, and the execution of the deed as security, is as follows: "I direct my executors, as soon as shall be practicable and consistent with the interest of my estate, to convert all my property both real and personal into money, and to put the same at interest on good and sufficient security in a State or National Bank in the city of Dubuque, Iowa." No such authority as the executrix exercised was conferred upon her by this clause of the will. It directs the conversion of the property into money, and the loaning thereof, thus providing for accumulations of money in the hands of the executor. The course pursued was the directly opposite, whereby the estate became the payer of interest instead of receiving it. Under the will

the executrix was directed to sell the property of the estate for money, not to borrow money and pledge real estate to its payment.

2. The executrix reported the fact that she had borrowed the money, with an account showing its disbursement. This report and the account were presented to the Circuit Court, and an indorsement of approval made thereon. But this action of the court, without the course prescribed by the statute having been followed by the executrix, did not validate the transaction done without authority. As the law did not authorize the transaction and prescribe that manner of converting the property of the estate into money, the approval of the court does not defeat its provisions. There is no statute authorizing an executor to borrow money, and as a security, convey the land of the estate. The course to be pursued in selling land of an estate is prescribed by statute. The whole transaction must be held invalid.

3. The estate has received the benefit of the money which was advanced by defendant. It ought in good conscience to repay it with legal interest. This is not required because of the contract under which the money was borrowed, which is invalid, but on the ground that the estate has had the benefit of the money received from defendant. Therefore the interest to be paid defendant must be six per centum per annum, and not ten per centum as agreed by the executrix. For the same reason the estate should pay as principal only the sum originally received, viz., $2,430. The judgment of the Circuit Court is, therefore, *Affirmed.*

FIRST BAPTIST CHURCH OF ERIE *v.* CAUGHEY *et al.*, ADMINISTRATORS.

IN THE SUPREME COURT OF PENNSYLVANIA, OCTOBER 16, 1877.

[*Reported in* 85 *Pennsylvania State Reports,* 271.]

ERROR to the Court of Common Pleas of Erie County: of October and November term 1877, No. 145.

Assumpsit by S. S. Caughey and H. B. Fleming, administrators of Joseph Neeley, deceased, to recover the amount unpaid, with interest, on the following note: —

$900. ERIE, December 24, 1867.

On the 1st day of February, 1869, we promise to pay, to the order of Joseph Neeley, nine hundred dollars; it being for use of First Baptist Church. Value received.

W. J. F. LIDDELL,
HORACE L. WHITE,
JAMES D. ROSS,
SAMUEL Z. SMITH.
Trustees of the First Baptist Church, Erie, Penna.

The remaining facts are sufficiently stated in the opinion of this court.

The defendants resisted the claim on the ground, first, that under the charter of the church the trustees had no authority to execute such an obligation as the one in suit, nor to borrow money; and secondly, that the money was for the payment of a note previously given by W. J. F. Liddell, one of the trustees, to one Catharine Smith, for money borrowed from her by him individually, and with which he paid a subscription he had made towards the building-fund of the church.

On part of the plaintiff it was contended that, whether the trustees had the right to bind the church by such an obligation, or not, yet if the money obtained from Mr. Neeley by the trustees was actually used in the construction of the church edifice, the church receiving the benefit of the same, there would be an implied obligation to pay, and plaintiff should be entitled to recover under the general *indebitatus assumpsit* counts in their declaration.

The Court, GALBRAITH, P. J., in the general charge said: —

"This I conceive to be a correct position. The trustees of a corporation may not bind it by such specialty containing such stipulations as these, in the absence of some express authority contained in the charter; but there are implied as well as express powers incident to every corporation; and in this case, if the jury believe from the evidence that the money for which the note was executed by the trustees was used by them, or by other officers of the church, in rebuilding the church building, and so went to the benefit of the society, then the law raises an implied obligation in equity and good conscience, as well as in law, on part of the church to repay it, and the verdict should be for plaintiff. If, on the contrary, the jury believe from the evidence that the money went to pay a debt of W. J. F. Liddell, one of the trustees who signed the note, the fact that the money for which the debt of Liddell was contracted was paid into the church treasury on a subscription made by him individually towards the building-fund, would not relieve the transaction or change its character, and plaintiff could not recover. The jury will decide as they find the weight of evidence upon this fact, and give their verdict accordingly."

The verdict was for the plaintiff, and after judgment the defendant took this writ, assigning for error the admission of the note in evidence and the foregoing charge of the court.

Allen & Rosenzweig for plaintiff in error.

James C. & F. F. Marshall for defendants in error.

Mr. Justice MERCER delivered the opinion of the court, January 7, 1878.

All the assignments of error may be answered in the consideration of two questions, — the one whether the corporation had the power to incur the alleged liability;[1] the other whether there was sufficient evidence to submit to a jury that the liability was actually incurred.

[1] As to the liability of a corporation in quasi-contract for benefits received from *ultra vires* transactions, see *infra*.

1. The original charter declares one of the objects of the association to be "the building of a meeting-house, and settlement and support of a pastor or minister of the gospel for the worship of Almighty God, and the religious instruction of the congregation, . . . together with that of the purchase and tenure of such lands or lots as may be necessary and convenient for the site of a meeting-house, of a burial-ground, and of a parsonage house of convenient size for their minister." A supplement to the charter gives the corporation power to assess and collect a tax on the pews; but not to exceed in any one year twenty per centum upon a fixed valuation, for the purpose of defraying the expenses of repairs, insurance and minister's salary, together with incidental expenses. The charter is silent on the subject of borrowing money.

Some thirty years after the corporation was formed, the church edifice became unsuitable and inadequate for the enlarged congregation. It therefore resolved to rebuild and enlarge the meeting-house. This required an expenditure beyond the sum subscribed by voluntary contributions, for that purpose. The meeting-house was rebuilt. Had the corporation power to contract a debt in rebuilding beyond the amount subscribed? We think it had. The object of its incorporation could not be fulfilled without the meeting-house. No clause in its charter forbid its contracting a debt in the erection of its necessary buildings. Whether it hired laborers and bought materials on a credit, or whether it borrowed money with which to pay for the labor and materials when procured, the liability incurred was for the same purpose. As it could not have successfully defended against the wages of a laborer employed in the erection of the house through want of power to employ him, so it cannot defend against the payment of money borrowed and actually expended in the erection of the church. As to the policy of a church erecting a house of worship far beyond its available means, we do not now feel it necessary to indicate an opinion. Certain it is, that the small sum here in controversy is trifling compared with the large debts resting upon many of the churches in towns and in cities.

2. The charter declared the business and affairs of the association should be under the direction and management of five trustees, a majority of whom should constitute a quorum. It further declared the trustees should "have the general care, superintendence, and management of the concerns of the same."

During the progress of the work, Mr. Liddell, one of the trustees, appears to have been the financial agent and manager, in behalf of the board of trustees. In raising the funds necessary, he borrowed $1200 from Mrs. Smith, and gave his individual note therefor. Subsequently the trustees borrowed $900 of Joseph Neeley, to pay so much of the debt due to Mrs. Smith, and four of them executed and delivered the note for the sum thus borrowed. The court doubted the power of the plaintiff in error to give the note, and the consequent liability of the corporation thereon alone; but

substantially charged that there were certain implied powers incident to every corporation, and if they were satisfied, from the evidence, that the money for which the note was given was actually used in rebuilding the church, and thus went to the benefit of the society, the law raised an implied obligation on the part of the church to repay it. It was contended on the argument that there was no evidence that the money was used in rebuilding the church. The answer to this objection is shown in several parts of the record. The note itself contains the written declaration of four of the trustees jointly, when engaged in making the loan, that the $900 were "for use of First Baptist Church." The settlement which Liddell subsequently made, as appears by the receipt signed by the president of the board of trustees, and one other trustee, declares, "We hereby assume all liabilities of said church for which said W. J. F. Liddell as trustee has become responsible, including note given to Mrs. Catharine Smith, signed by himself individually, for the use of said church, according to settlement made this day." On the trial of the cause, James Dunlap, president of the board of trustees, was called, by defendants in error, as a witness, and in his testimony in chief said, "in repairing church had to borrow money; were advised by counsel that church could not borrow it; must be individual; the money borrowed from Neeley was paid to Mrs. Catharine Smith, to discharge a debt to her for money borrowed by Mr. Liddell for the church." It is true, on cross-examination, his evidence goes to impair the validity of the receipt to which his name was subscribed, and he further said "none of the Neeley money was received by the church." I think the fair interpretation of his testimony is that the money was not actually paid into the hands of the trustees, but was paid directly by Neeley to Mrs. Smith. It was, however, a question for the jury to determine. It is further shown by the evidence that the plaintiff in error made a payment of $300 on the note given to Neeley; the indorsement thereof being in the handwriting of the treasurer, now deceased, of the corporation.

This chain of evidence, both written and verbal, tending to show how the business was conducted and settled, ratified by a partial payment, was certainly sufficient to submit to the jury to find that the money was used in rebuilding the church.

Judgment affirmed.

GEORGE H. BILLINGS *v.* INHABITANTS OF MONMOUTH.

In the Supreme Judicial Court of Maine, April 6, 1881.

[*Reported in* 72 *Maine Reports*, 174.]

On exceptions and motion for a new trial.

Assumpsit on three promissory notes signed "William G. Brown, Treasurer;" also for money had and received.

Plea was general issue, and statute of limitations was set up under a brief statement.

The verdict was for $3004.81.

The exceptions relate to the admission in evidence of the notes declared upon, of certain other notes, and of the records, accounts, and settlements with the treasurer of the defendant town. Exceptions were also taken to the part of the charge to the jury given below: —

"Now a question is raised here in the very beginning whether these notes are the notes of the town, or the notes of the treasurer. I do not deem it necessary to state in regard to that now. I do not care to state it for the reason that there are several actions pending, in which that very question will be raised and will be finally settled by the law court. And it is sufficient for me to say to you, that those notes were not authorized by any vote of the town. . . . That lays the notes out of the case;" — and to other parts of the charge covering several pages.

G. C. Vose for the plaintiff.

J. H. Potter for the defendants.

Barrows, J. The defendants' objections to the reception in evidence of the notes sued, and certain other notes and renewals thereof, which were claimed by plaintiff in one phase of the case to constitute the consideration of the notes in suit, and like objections to the records of the doings of the town at various town meetings, between 1862 and 1872, and to the reports of the town treasurer at its annual meetings, from 1865 to 1877 inclusive, all accepted by the town, and to the settlements of the treasurer with the selectmen, if said objections could be supposed in any view of them to possess merit, became altogether immaterial, when the presiding judge, with full instructions as to the effect of a want of authority upon the validity of the notes, peremptorily instructed the jury that "these notes were not authorized by any vote of the town, that they were not ratified, that there was nothing in the case which would authorize any such inference," and finally, that "that lays the notes out of the case, and brings us to the other count, that for money had and received."[1]

[1] A portion of the opinion relating to the admissibility of evidence has been omitted. — Ed.

The defendants' counsel insists in argument upon the refusal of the presiding judge to rule upon the question, whether the notes were in form notes of the town, or notes which could bind the treasurer only. If the instructions to the jury had permitted a recovery upon the notes in any contingency, that inquiry would seem to be pertinent. But they did not. The notes were "laid out of the case," and the plaintiff's right to recover was made to depend upon his establishing what was necessary to entitle him to a verdict upon the count for money had and received. The testimony tending to show authority or ratification was weighed and found wanting. After this, there was no occasion to pass upon the construction of the notes, any more than there was in Parsons *v.* Monmouth.[1]

That any negotiable paper, made by the officers of a town in the transaction of its ordinary business, not proceeding under special authority conferred by some statute, will be subject, even in the hands of a *bona fide* indorsee, to all equitable defences that might be made against the original promisee, is well settled in this State, as appears in the case last named, and the cases there cited.

And the plain doctrine of Bessey *v.* Unity,[2] and Parsons *v.* Monmouth, is that the holder of such paper who has lent money upon the representation of town officers that it was wanted for municipal use, must go farther and show the appropriation of the money lent to discharge legitimate expenses of the town, unless he can show that such officers were specially authorized, by vote of the town at a legal meeting, to effect the loan. The case at bar seems to have been tried in careful conformity with these rules. The fallacy of the greater part of the defendants' argument upon the exceptions consists in ignoring the fact that "the notes were laid out of the case."

It is strongly implied in the two cases last above cited that money thus advanced and shown to have been actually appropriated to the discharge of legal liabilities of the town, would be held recoverable in an action for money had and received against the town. We see no good reason to excuse the town from refunding it when it has been actually thus appropriated. The plaintiff by such proof brings his case fully within the principles that govern the action for money had and received. He shows his money received and appropriated by the agents of the town to the legitimate use of the town, and in such case the want of an express promise to repay it will not defeat the action. The law will imply a promise, sometimes, even against the denial and protestation of the defendant. Howe *v.* Clancey.[3]

It is the payment of the lawful debts of the town by its own agents with the plaintiff's money which constitutes the cause of action.

To allow a recovery by the plaintiff of whatever sum he can show has thus inured to the benefit of the town, is a more compendious mode of settling the controversy than the English method of subrogating the lender of the money to the rights of the perhaps numerous corporation creditors,

[1] 70 Me. 264. [2] 65 Me. 342. [3] 53 Me. 130.

who have been paid with the funds procured without authority, — a mode of doing justice which manifestly tends to a multiplicity of suits, when, for aught we see, the proper result may be reached, at all events with the assistance of an auditor, in a single action.

Looking at the issue which was in fact presented to the jury, it will be seen that defendants' counsel is in error in supposing that if the presiding judge had ruled that if the notes were in form the individual notes of Brown, "that would have ended the conflict and the plaintiff would have been nonsuited."

The plaintiff offered testimony tending to put his case upon another footing than that of Parsons *v.* Monmouth, and hence all the evidence which had a tendency to show that plaintiff's money was used for the payment of some legitimate indebtment of the town was strictly relevant; and the instructions (of some of which the defendants complain) were appropriate to direct the attention of the jury to that which was the chief subject of inquiry. Thus it is obvious that the deficiency in the town treasurer's accounts was of importance only upon the question, what was done with the plaintiff's money, and as it might bear upon that question, the presiding judge called the attention of the jury to it. The defendants surely have no cause of complaint that he did so, nor that he required the jury carefully to ascertain such facts as were necessary to determine whether the old notes which (it was claimed) were paid with this money were barred by the statute of limitations, and whether, if the plaintiff's money was paid to discharge them, they represented not only just but legal claims against the town.

The vital question of fact, whether the plaintiff's money had actually been applied by the town officers to the extinguishment of legal claims against the town, was settled by the jury against the defendants. The jury found that it was so applied. The testimony produced by the plaintiff, if believed, justified the finding, and there is nothing in its character or in that of the accounts produced which decisively stamps it as untrue. There is an apparent error of a few dollars in the reckoning of interest. When the plaintiff has cured this by a *remittitur*, the entry will be

Motion and exceptions overruled.

APPLETON, C. J., WALTON, VIRGIN, LIBBEY, and SYMONDS, JJ., concurred.[1]

[1] In recent cases in this State it has been held, that when selectmen have acted without special authority in procuring loans of money for municipal purposes, if the lender would recover in an action of assumpsit against the town the amount of the loans, he must prove not only that the money was received by the selectmen in their official capacity but also that it was applied by them to the use for which it was obtained, to meet and discharge existing municipal liabilities; that towns themselves by the statutes organizing them are strictly limited in the exercise of the powers of borrowing and appropriating money; that selectmen do not possess by virtue of their office a general authority to hire money upon the credit of the town; that some action of the town, the body cor-

(c.) *Mistake may be as to the Validity or Amount of a Claim.*[1]

PRICE *v.* NEAL,

IN THE KING'S BENCH, NOVEMBER 16, 1762.

[*Reported in* 3 *Burrow*, 1354.]

THIS was a special case reserved at the sittings at Guildhall, after Trinity term, 1762, before Lord MANSFIELD.

It was an action upon the case brought by Price against Neal, wherein Price declares that the defendant Edward Neal was indebted to him in £80 for money had and received to his the plaintiff's use; and damages were laid to £100. The general issue was pleaded, and issue joined thereon.

It was proved at the trial, that a bill was drawn as follows: —

"Leicester, 22d November, 1760. Sir, six weeks after date pay Mr. Rogers Ruding or order forty pounds, value received, for Mr. Thomas Poughfor; as advised by, Sir, your humble servant, Benjamin Sutton. To Mr. John Price in Bush-lane, Cannon-street, London." Indorsed "R. Ruding, Antony Topham, Hammond, and Laroche. Received the contents, James Watson and Son; witness Edward Neal."

That this bill was indorsed to the defendant for a valuable consideration, and notice of the bill left at the plaintiff's house, on the day it became due. Whereupon the plaintiff sent his servant to call on the defendant, to pay him the said sum of £40 and take up the said bill; which was done accordingly.

That another bill was drawn as follows: —

"Leicester, 1st February, 1761. Sir, six weeks after date pay Mr. Rogers Ruding or order forty pounds, value received, for Mr. Thomas Ploughfor; as advised by, Sir, your humble servant, Benjamin Sutton. To Mr. John Price in Bush-lane, Cannon-street, London." That this bill was indorsed. "R. Ruding, Thomas Watson and Son. Witness for Smith, Right and Co." That the plaintiff accepted this bill, by writing on it, "Accepted John Price;" and that the plaintiff wrote on the back of it: "Messieurs Freame and Barclay, pray pay forty pounds for John Price."

That this bill being so accepted was indorsed to the defendant for a

porate, within the scope of its corporate powers, is required to confer prior authority to borrow money in its name; and if a liability is alleged on the ground that the plaintiff's loan was one the municipality had a legal right to procure, and that, though its officers did not act with authority at the time, it has subsequently availed itself of the money loaned by accepting its application to the payment of municipal debts, it is for the plaintiff to prove the facts which support the allegation. SYMONDS, J., in Lincoln *v.* Stockton, 75 Me. 141, 144. — ED.

[1] The chronological arrangement of cases has been departed from to some extent in this subdivision. — ED.

valuable consideration, and left at his bankers for payment; and was paid by order of the plaintiff, and taken up.

Both these bills were forged by one Lee, who has been since hanged for forgery.

The defendant Neal acted innocently and *bona fide*, without the least privity or suspicion of the said forgeries or of either of them; and paid the whole value of those bills.

The jury found a verdict for the plaintiff, and assessed damages £80 and costs 40*s.*, subject to the opinion of the court upon this question, —

"Whether the plaintiff, under the circumstances of this case, can recover back from the defendant the money he paid on the said bills, or either of them."

Mr. *Stowe*, for the plaintiff, argued that he ought to recover back the money, in this action, as it was paid by him by mistake only, on supposition "that these were true genuine bills;" and as he could never recover it against the drawer, because in fact no drawer exists; nor against the forger, because he is hanged.

He owned that in a case at Guildhall, of Jenys *v.* Fawler *et al.*[1] (an action by an indorsee of a bill of exchange brought against the acceptor), Lord Raymond would not admit the defendants to prove it a forged bill, by calling persons acquainted with the hand of the drawer to swear "that they believed it not to be so;" and he even strongly inclined, "that actual proof of forgery would not excuse the defendants against their own acceptance, which had given the bill a credit to the indorsee."

But he urged, that in the case now before the court the forgery of the bill does not rest in belief and opinion only, but has been actually proved, and the forger executed for it.

Thus it stands even upon the accepted bill. But the plaintiff's case is much stronger upon the other bill which was not accepted. It is not stated "that that bill was accepted before it was negotiated;" on the contrary, the consideration for it was paid by the defendant before the plaintiff had seen it. So that the defendant took it upon the credit of the indorsers, not upon the credit of the plaintiff; and therefore the reason, upon which Lord Raymond grounds his inclination to be of opinion "that actual proof of forgery would be no excuse," will not hold here.

Mr. *Yates*, for the defendant, argued that the plaintiff was not entitled to recover back this money from the defendant.

He denied it to be a payment by mistake, and insisted that it was rather owing to the negligence of the plaintiff, who should have inquired and satisfied himself, "whether the bill was really drawn upon him by Sutton, or not." Here is no fraud in the defendant, who is stated "to have acted innocently and *bona fide*, without the least privity or suspicion of the forgery; and to have paid the whole value for the bills."

[1] 2 Str. 946.

Lord MANSFIELD stopt him from going on, saying that this was one of those cases that could never be made plainer by argument.

It is an action upon the case for money had and received to the plaintiff's use. In which action, the plaintiff cannot recover the money, unless it be *against conscience* in the defendant to retain it; and great liberality is always allowed in this sort of action.

But it can never be thought unconscientious in the defendant, to retain this money, when he has once received it upon a bill of exchange indorsed to him for a fair and valuable consideration, which he had *bona fide* paid without the least privity or suspicion of any forgery.

Here was no fraud; no wrong. It was incumbent upon the plaintiff to be satisfied "that the bill drawn upon him was the drawer's hand," before he accepted or paid it;[1] but it was not incumbent upon the defendant to inquire into it. Here was notice given by the defendant to the plaintiff of a bill drawn upon him, and he sends his servant to pay it and take it up. The other bill he actually accepts; after which acceptance, the defendant innocently and *bona fide* discounts it. The plaintiff lies by for a considerable time after he has paid these bills, and then found out "that they were forged;" and the forger comes to be hanged. He made no objection to them, at the time of paying them. Whatever neglect there was, was on his side. The defendant had *actual encouragement* from the plaintiff himself, for negotiating the second bill, from the plaintiff's having without any scruple or hesitation paid the first; and he paid the whole value *bona fide*. It is a misfortune which has happened without the defendant's fault or neglect. If there was no neglect in the plaintiff, yet there is no reason to throw off the loss from one innocent man upon another innocent man; but, in this case, if there was any fault or negligence in any one, it certainly was in the plaintiff, and not in the defendant.

Rule; that the *postea* be delivered to the defendant.

SMITH *v.* MERCER.

IN THE COMMON PLEAS, FEBRUARY 13, 1815.

[*Reported in* 6 *Taunton*, 76.]

ASSUMPSIT for money had and received, and on the other money counts. At the sittings in London after Michaelmas term, 1814, before GIBBS, C. J., a verdict was found for the plaintiffs for £120, subject to a case: The plaintiffs were bankers in London, with whom Maurice Evans kept cash; the defendants were bankers at Tunbridge, and were *bona fide* holders, for a valuable consideration, paid by them to Peter Le Souef, of a bill of exchange, drawn on 15th Feb., 1811, by Thomas Temple, at 65 days' date, on

[1] *Cont.* Wilkinson *v.* Lutwidge, 1 Str. 648. – ED.

Maurice Evans, for £120, payable to the drawer's order, and indorsed by Temple and P. Le Souef. The bill, when it came to the defendant's hands, appeared to be thus accepted: "Smith, Payne, & Smiths, Maurice Evans." This acceptance was forged. Before the bill was due, the defendants indorsed the same, and sent it with their indorsement thereon to their corresponding bankers and agents in London, Spooner & Co., to be received for them at maturity. Upon the bill being presented by Spooner & Co. to the plaintiffs for payment on the 23d of April, when it became due, they immediately paid the amount to Spooner & Co., who paid the amount in account to the defendants; all the parties being at the time equally ignorant of the forgery. The plaintiffs sent the bill to Evans at the usual time, with the other vouchers of payments made for him, and Evans immediately returned the same to them as forged, and refused to allow the payment thereof as a payment made on his account. The plaintiffs, upon discovering the forgery, on the 30th of April, 1814, gave notice to the defendants that the acceptance was forged, and required the defendants to repay the money, which they refused to do.

Lens, Serjt., for the plaintiffs.

Best, Serjt., for the defendants.

On this day the Court delivered their opinions *seriatim*.

Dallas, J., recapitulated the facts of the case, after which he thus proceeded. It is stated in the case that all the parties at the time of payment of the bill were equally ignorant of the forgery; and the question is, on whom the loss ought to fall? And though the facts are not precisely the same, I think the case of Price *v.* Neal[1] furnishes a rule which ought to govern the present. The case of Price *v.* Neal was in substance this: Two bills had been drawn, the first was only presented when due; the second, drawn some time after the first, was accepted, and paid when due. Both proved to be forgeries as to the handwriting of the drawer; and the plaintiff, who had paid them, contended, that having paid by mistake he was entitled to recover back the money from the indorsee, who was an innocent and *bona fide* holder. As to the facts of this case, it may be necessary to distinguish, before adverting to the judgment of the court. The first bill had not derived additional credit from the acceptance, for it had not been accepted; but the second bill had been accepted, and was therefore different in this respect. The action was brought to recover back the amount of both bills. For the plaintiff, the argument at the bar proceeded on the ground of payment by mistake; but the first bill was said to stand upon ground even stronger than the second, inasmuch as when negotiated it had not been accepted, and therefore was not taken upon the credit of the acceptor. In the judgment of the court the two bills are also distinguished, but the distinction does not lead to any difference of conclusion; for the defendant was adjudged to retain as to both, and, as it seems, partly on two

[1] 3 Burr. 1354, and 1 Bl. 390.

grounds; 1st, of neglect in the plaintiff; 2dly, that supposing no neglect, the loss ought not to be shifted from one innocent man upon another. With the latter ground I shall not interfere upon the present occasion, for the former goes the whole length of reaching this case. And to see that it does it is only necessary to ask, what was the neglect? The answer must be, the having paid when due caution would have prevented such payment. If an acceptor is then bound to know the drawer's handwriting, is it less the duty of a banker to know the handwriting of his customer? In degree, it is more so; for he sees it, probably every day. I consider therefore the payment of this bill as a want of due caution on the part of the plaintiffs. But to distinguish it from Price *v.* Neal, it is said, payment by the bankers, after it became due, did not add to its credit or negotiability; so it was with the first bill in the case of Price *v.* Neal; yet this made no difference. Is it however productive of no injury to any of the parties on the bill? Suppose Smith & Co. had not paid it, it would have been immediately returned to Spooner, and by him to Le Souef the indorser, and it might have been recovered, or put in suit. But the effect of the delay has been to give him an extended credit; and how am I able to say that his situation in the intermediate time may not have undergone such a change, as to render him incapable of paying what he could have paid upon proper notice and demand. Nor do I think it will be an answer, to observe that nothing of this sort is stated in the case; for the plaintiffs had no right to cast upon the defendants the burthen of such proof, which, in point of law, if the fact had existed and could have made any difference, it was for themselves to produce. The ground, therefore, on which I rest my opinion, and to which I wish to confine it, is the want of due caution in having paid the bill, the effect of which has been to give time to different parties, which the plaintiffs were not authorized to do.

CHAMBRE, J. I think the plaintiffs are in this case entitled to recover. The bill appears drawn in the name of Thomas Temple, payable to himself or order, directed to Maurice Evans, and indorsed by Temple. The next indorser is Peter Le Souef, and it appears that the bill had the forged acceptance on it when it was in his hands, and in that state he indorsed it, and the defendants received it from him for a valuable consideration, *bona fide* paid to him by the defendants. The forged acceptance purported to make the bill payable at the plaintiffs', who were the bankers of the supposed acceptor in London. The defendants, in order to receive the money for which the bill was given, indorsed it, and sent it to their bankers in town, who sent it to the plaintiffs, and they immediately paid it, under the supposition that they were directed so to do by Evans. At what particular period the forgery was committed, and who was then the holder of the bill, is not stated; but it is stated that the parties at the time, meaning, I suppose, the plaintiffs, the defendants, and their bankers, were equally ignorant of the forgery. About a week afterwards, the plaintiffs sent the bill as a

voucher to Evans, and he, finding out the forgery, refused to allow the payment, and sent back the bill to the plaintiffs. The plaintiffs then gave the defendants notice that the acceptance was forged, and required the money to be repaid. Upon these facts the present action is brought, and it is brought on the general principle that when money not really due is paid by mistake, it is recoverable in this form of action. In this case the money has been paid without any consideration, and under a mistake; and not only under a mistake, but under a representation made to the plaintiffs by the defendants, who indorsed the bill with that forged acceptance on it, that the plaintiffs were required and directed so to pay it, by the person whose agents they were in money transactions. Cases undoubtedly may exist that form exceptions to the general rule. Such are cases respecting bills of exchange, under circumstances wherein the doctrine might produce injurious consequences in that species of negotiation, and particularly where the party claiming restitution has himself, though innocently, given credit to the instrument by his own previous acceptance or indorsement. There the party who wants to recover back his money has himself given a kind of warranty to subsequent takers, and will not be permitted to recover against those who have innocently received the money claimed to be due on such bills. The case of Jenys *v.* Fawler[1] is alluded to both in Blackstone's and Burrow's reports of Price *v.* Neal. That was a case where the acceptor was not permitted to prove the forgery of the bill he had accepted, for the reason given by Lord Raymond, C. J., that it would be dangerous to negotiable notes. Blackstone says, the demand on the accepted bill in Price *v.* Neal, was, on the authority of that case, given up by the plaintiff's counsel, and I cannot well understand why the reasons which relate thereto are introduced into the consideration of the court on the other bill in Price *v.* Neal; but the other part of that case, which relates to the bill not accepted, was there the subject of the decision of the court, and is relied on in the present case, as an authority for the defendants. Blackstone, J., has in his report rather jumbled together the observations applicable to the case on one of the bills with those applicable only to the other. Among other things, the acceptance is relied on as applicable to both. All that he makes the court say respecting the unaccepted bill, is, "The negligence in the plaintiff (who had taken up the forged bill), is greater than can possibly be imputed to the defendant." That is a singular subject of calculation. He says, "where the loss has fallen, there it must lie; one innocent man must not relieve himself by throwing it on another." So I should say here. The defendants have paid their money for that which is of no value; they have thereby sustained a loss, and they ought not be permitted to throw that loss upon another innocent man, who has done no act to mislead them; and still less ought they to be so permitted, where, instead of being misled by any act of the plaintiffs, they themselves have given the appearance of

[1] 2 Str. 946.

authenticity to the instrument by their own indorsement, which was a sort of warranty of its genuineness at a time when the forged acceptance made a part of the instrument. The report of the case in Burr. is fuller. It speaks of the liberality of the action for money had and received, and puts the case upon the ground that the defendant might conscientiously retain the money, not because it was his, but because he has hold of it without any fraudulent intent. How he can satisfy his conscience by keeping that which is not his, I cannot tell, but it is better not to encourage too far this latitude of conscience. The matter however has been lately discussed and decided in this court in the two cases of Jones *v.* Ryde and Bruce *v.* Bruce. (Here the learned judge stated the case of Jones *v.* Ryde.) A great part of the doctrine of Price *v.* Neal seems in that case to be wholly repudiated by the court. Fenn *v.* Harrison[1] was there cited, and my Lord Chief Justice says, "It is true that if he who negotiates a bill does not indorse it, he does not subject himself to that responsibility which the indorsement would bring on him, viz., to an action to be brought against him as indorser, but he does not get rid of that responsibility which arises from his passing off an instrument of no value, and receiving value for it;" and he compared it to the case of paying away forged bank notes. My Brother HEATH there adverts to what is said by Lord KENYON, that the person paying under such circumstances is entitled to recover back the money, and he refers to Cripps *v.* Reade;[2] and my Brother DALLAS refers to the same case, and concurs with the rest of the court. Bruce *v.* Bruce is a still stronger case. There the bill was actually paid, but the court said they could not distinguish it from the case before decided. It is said in this case the negligence varies it; what was the negligence? How perfect the forgery was, we do not know. Some forgeries will deceive the party whose name is forged. Did the plaintiffs omit any degree of reasonable diligence which lay within their power? Evans, when the bill was sent to him, could not be deceived; he must know; he detected the forgery, and gave immediate notice; where then is the negligence? The bill had done its office, had ceased to be negotiated. It is not like bills which have to go further in circulation. I cannot therefore think this was a case of gross negligence in the plaintiffs. The situation of the plaintiffs is extremely material. They are no parties to this bill, neither drawers, acceptors, or payees. They are not purchasers of the bill; they never had any property in it; they are mere servants and agents of the payees; it is, as to them, a payment under a supposed authority, which does not exist. It falls within the general principle. My opinion therefore is, that the plaintiffs are entitled to recover.

HEATH, J. I am of opinion that a nonsuit ought to be entered. I agree that this is a case of money paid without consideration, and I agree in the general principle, that money paid without consideration upon an instrument which proves to be of no value, may be recovered back; but there are

[1] 3 T. R. 757. [2] 6 T. R. 606.

particular circumstances in this case which materially alter, and take this case out of the general principle. If Evans had paid the bill, it is clear he would have been bound. Can an agent be in a better situation than his principal? As between Evans and the agent, it may be a question whether the latter kept within the scope of his authority; but as to the rest of the world, it is the same thing whether it be the act of Evans or of his agent. It would be strange, if in an action by Evans himself he ought to be nonsuited, and that if the action be by the agent, he should recover. The situation of bankers is most peculiar; they are bound to know the handwriting of their customers. If the law were otherwise, merchants making their bills payable at their bankers would have this extraordinary advantage, that if a forgery be imposed on their bankers, the principal would not be the sufferer by it; whereas, if it were imposed on themselves, they must bear the loss, and so would exempt themselves from that liability which would rest on them if they themselves transacted their own business.

GIBBS, C. J. I concur in opinion with my Brothers HEATH and DALLAS. A narrow and particular ground is with me conclusive on this case. If the acceptance had been genuine, and the plaintiffs had refused payment, the defendants had their remedy against the supposed acceptor; or if they failed to obtain the amount from him, they had their remedy against the prior parties on the bill. The acceptance carried with it an order on the bankers of the supposed acceptor to pay the money; it purported to be an order of Evans, whose bankers the plaintiffs were. It was incumbent on them to see to the reality of that order before they obeyed it; and if, by obeying it, they are sufferers, they ought not to throw on another a loss accruing without fault of his. See the circumstances! The defendants present the bill for payment, and it is paid to them. The money remained in their hands without demand made on them for it, from the 23d of April to the 30th of April; the forgery being then discovered, the plaintiffs demand it back from the defendants. If the plaintiffs had originally refused to pay this money, the holder would immediately have given notice to the drawer and to the immediate indorser, which would have been transmitted to the first indorser and drawer. In consequence of the bill being paid, the defendants continued to have the money in their hands till the 30th of April. I think it was then too late for the defendants to give notice to the prior parties; and by not having given such notice, they lost their remedy against those parties. If a person liable on a bill does not receive notice within a reasonable time, he is discharged for want of such notice. Here Temple was discharged; by whose default? By the plaintiffs'! The defendants, while the bill continued paid, could not have given notice to him; for the bill was not then dishonored; and as the defendants have lost that opportunity by the negligence of the plaintiffs, the latter cannot recover back the money from the former. I have put the case on the express point that by the acts of the plaintiffs the defendants are put in a

worse situation; but I do not mean thereby to express my dissent from the larger ground on which the case has been put by my Brothers HEATH and DALLAS; but I think the ground on which I have put it is alone a sufficient answer to all the arguments that have been used, and is sufficient to warrant us in giving *Judgment of nonsuit.*

WILKINSON AND OTHERS *v.* JOHNSTON AND OTHERS.

IN THE KING'S BENCH, NOVEMBER 27, 1824.

[*Reported in* 3 *Barnewall & Cresswell*, 428.]

ASSUMPSIT brought by the plaintiffs to recover back the sum of 589*l.* 6*s.* 8*d.*, paid by them as they alleged in mistake on three bills of exchange. At the trial before ABBOTT, C. J., at the London sittings before Michaelmas term 4 G. 4., a verdict was found for the plaintiffs, subject to the opinion of the court upon the following case. About eleven o'clock on the morning of Monday, the 3d of February, 1823, a notary public, who had been employed by Messrs. Smith, Payne & Smith, to note three bills of exchange which became due on the Saturday preceding, and which he had on that day presented for payment at the house of Messrs. Masterman & Co., where they were made payable, and refused payment, called, in consequence of the dishonor of the said bills, but without any order from Smith, Payne & Smith, with the said bills at the banking house of the plaintiffs, who carry on trade and business in partnership together as bankers in London, for the purpose of the same being taken up by the said plaintiffs, for the honor and on account of Messrs. A. Heywood, Sons & Co., who appeared to be indorsers upon the said bills, and whose London bankers the said plaintiffs then were, and still are. The following is a copy of one of the said bills of exchange, and of the several indorsements thereon.

No. 214*l.* 10*s.* LIVERPOOL, Oct. 30, 1822.

Three months after date, pay to the order of Charles Thompson, Esq., two hundred and fourteen pounds ten shillings sterling, value received as advised.

CROPPER, BENSON & Co.

To Messrs. BIRLY & HORNBY, Manchester.
To be paid at Masterman's, London.

The names Birly and Hornby were written across the bill, and it was indorsed, "Charles Thompson, A. Heywood, Sons & Co.; pay to the order of Mr. Henry G. Harvey, Geo. Green, Henry G. Harvey, pay Messrs. H. and T. Johnson & Co., or order Gordon, Batt & Co., H. and T. Johnson & Co." The other bills were the same in form and had the same indorsements; they were drawn for 187*l.* 8*s.* 4*d.* each. The notary who presented

the bills at the house of the plaintiffs was employed to present and note them as aforesaid, by Smith, Payne & Smith, bankers in London, who held the same as the bankers and agents of the defendants, who are in partnership together. The plaintiffs, believing that the bills were genuine bills, and that the indorsements in the names of A. Heywood, Sons & Co., were their genuine indorsements, took up the same for the honor, and on the account of the said A. Heywood, Sons & Co., and forthwith paid to the notary who presented the bills the sum of 589*l.* 6*s.* 8*d.*, being the amount of the several bills, which was carried by the notary and paid to Smith, Payne & Smith, as the bankers of the defendants, and the clerk of Smith, Payne & Co. immediately entered the same in their counter book. The clerk of the plaintiffs, upon paying the said sum to the notary, struck out all the indorsements on the bills, subsequent to that of Messrs. A. Heywood, Sons & Co. Immediately after the bills were so paid by the plaintiffs, it was discovered that the same were not genuine bills, but that the names of the drawers and acceptors, and the names of A. Heywood, Sons & Co., on whose account the payment had been made, were forgeries. Upon the same day and before the hour of one o'clock, the plaintiffs gave notice to the defendants, and also to Smith, Payne & Smith, that the bills were discovered not to be genuine bills, but that the same were forged in the particulars before mentioned; and as well Smith, Payne & Co., as also the defendants, were at the same time informed that the names of the indorsers, subsequent to the indorsement purporting to be the indorsement of A. Heywood, Sons & Co., had been struck out by mistake, and under the belief that the indorsement purporting to be the indorsement of A. Heywood, Sons & Co. was genuine; and the plaintiffs then demanded of Smith, Payne & Smith, and of the defendants, the money which had been paid by the plaintiffs as aforesaid, which Smith, Payne & Smith, and the defendants, refused to return. It was afterwards agreed, without prejudice, by the plaintiffs and defendants, that the defendants should return the bills to the indorsers from whom they received them, which was done accordingly, and such indorsers had due notice as well of the presentment of the bills of exchange at the place where payable, and of their being dishonored, as also of the circumstances above detailed; but the indorsers refused to take them up, on the ground that the bills had been paid by the plaintiffs; and also on the ground that the indorsements before mentioned had been struck out, and that the indorsers had thereby lost their remedy over.

Tindal for the plaintiffs.

R. V. Richards and *Parke* for the defendants.

Abbott, C. J. This case was argued before three of the judges at the sittings in the adjoining room, and again before the whole court at the sittings before the present term. In the argument two points were made. First, whether the plaintiffs could have recovered back the money which they paid on the bills in question, supposing they had not struck out the

indorsements subsequent to the name of Heywood & Co., for whose honor they paid the bills. Secondly, whether their right to recover was defeated by that act.[1]

Upon the first question, the cases of Jones *v.* Ryde [2] and Bruce *v.* Bruce [3] were cited for the plaintiffs; and Price *v.* Neal [4] and Smith *v.* Mercer [5] for the defendants. The general rule of law is clear and not disputed; viz., that money paid under a mistake of facts may be recovered back, as being paid without consideration. To this rule, the two cases cited for the defendant are an exception. The question is, whether the present case be properly within the rule, or within the exception. The case of Price *v.* Neal was that of a man upon whom two bills of exchange falling due at different times were drawn: he paid the first when presented at maturity, not having accepted it, and accepted and paid the second. This was all done under a mistaken opinion that the signature of the supposed drawer was genuine. Some time afterwards, it was discovered that the signature of the drawer was forged. The decision of Lord MANSFIELD against the plaintiff appears not to have been grounded on the delay, but rather upon the general principle, that an acceptor is bound to know the handwriting of the drawer, and that it is rather by his fault or negligence than by mistake, if he pays on a forged signature. The case of Smith *v.* Mercer was that of a banker at whose house a bill purporting to be accepted by one of his customers was made payable. The forgery of the acceptor's name was not discovered until the end of a week. In this case Mr. Justice CHAMBRE thought the plaintiffs entitled to recover. The other judges were of a different opinion. Mr. Justice DALLAS appears to have founded his judgment principally on the supposed fault or neglect of the plaintiffs, who ought to have known the signature of their customer; though he also notices the delay, and the inconvenience that might thereby result to the holders of the bill. Mr. Justice HEATH appears to have given his judgment entirely on the ground of the fault or neglect of the plaintiffs, who could not, in his opinion, be in a different situation from that in which their customer would have stood if he had paid the bill himself. The Lord Chief Justice GIBBS grounds his judgment on the delay as sufficient for the decision of the cause; at the same time, however, declaring that he does not mean thereby to express his dissent from the larger ground on which the case had been put by the other two judges.

Now, if we compare the facts of the present case with those of the two cases before mentioned, we shall find some important difference. The plaintiffs were not the drawees or acceptors of the bills, nor the agents of any supposed acceptor. They discovered the mistake in the morning of the day they made the payment, and gave notice thereof to the defendants in time to enable them to give notice of the dishonor to the prior parties,

[1] So much of the opinion as relates to this question has been omitted. — ED.

[2] 5 Taunt. 488. [3] 5 Taunt. 495. [4] 3 Burr. 1354. [5] 6 Taunt. 76.

which was accordingly given. The plaintiffs were called upon to pay for the honor of Heywood & Co., whose names appeared on the bills among other indorsers. The very act of calling upon them in this character was calculated in some degree to lessen their attention. A bill is carried for payment to the person whose name appears as acceptor, or as agent of an acceptor entirely as a matter of course. The person presenting very often knows nothing of the acceptor, and merely carries or sends the bill according to the direction that he finds upon it; so that the act of presentment informs the acceptor or his agent of nothing more than that his name appears to be on the bill as the person to pay it; and it behoves him to see that his name is properly on the bill. But it is by no means a matter of course to call upon a person to pay a bill for the honor of an indorser; and such a call, therefore, imports on the part of the person making it, that the name of a correspondent, for whose honor the payment is asked, is actually on the bill. The person thus called upon ought certainly to satisfy himself that the name of his correspondent is really on the bill; but still his attention may reasonably be lessened by the assertion, that the call itself makes to him in fact, though no assertion may be made in words. And the fault, if he pays on a forged signature, is not wholly and entirely his own, but begins at least with the person who thus calls upon him. And though, where all the negligence is on one side, it may perhaps be unfit to inquire into the quantum, yet where there is any fault in the other party, and that other party cannot be said to be wholly innocent, he ought not, in our opinion, to profit by the mistake, into which he may by his own prior mistake have led the other; at least, if the mistake is discovered before any alteration in the situation of any of the other parties, that is, whilst the remedies of all the parties entitled to remedy are left entire, and no one is discharged by laches. Further, it is not easy to reconcile the opinion of some of the judges in Smith *v.* Mercer, with the prior judgment of the same court in Bruce *v.* Bruce. That was the case of a victualling bill, of which the sum was altered and enlarged, and in this alteration the forgery consisted. The whole sum was paid at the victualling office when the bill was presented by the Bank of England, but the forgery being discovered, the bank paid back the difference, and then called upon their customer, the plaintiff, who repaid the bank, and brought his action against the defendant, from whom he had received the bill in its altered state. Now, if the payment of the whole sum at the victualling office could not by law be rescinded on the ground of mistake, the refunding of part by the bank, and afterwards by the plaintiff, was an act done in their own wrong, and consequently not binding upon the defendant, nor giving a right of action against him. We think the present case approaches in principle nearer to that of Bruce *v.* Bruce, than to either of the other two. We think the payment in this case was a payment by mistake and without consideration to a person not wholly free from blame, and who ought not,

therefore, in our opinion, to retain the money, unless the act of drawing the pen through the names of the other indorsers will have the effect of discharging them, and thereby deprive the defendants of their rights to resort to them. *Postea to the plaintiffs.*

COCKS and Others *v.* MASTERMAN and Others.

In the King's Bench, Trinity Term, 1829.

[*Reported in* 9 *Barnewall and Cresswell*, 902.]

Assumpsit for money paid, had and received, etc. Plea, *non assumpsit.* At the trial before Lord Tenterden, C. J., at the London sittings after Michaelmas term, 1827, a special verdict was found, stating in substance as follows: Long before, and at the several times hereinafter mentioned, the plaintiffs carried on business as bankers at Charing Cross, in the city of Westminster, and the defendants carried on business as bankers in Nicholas Lane, in the city of London. Before and on and after the 24th of May, 1827, certain persons carrying on trade and business under the firm and style of Sewell & Cross, kept an account and cash with the plaintiffs as their bankers; and certain other persons, carrying on trade and business under the firm and style of Sanderson & Co., kept an account and cash with the defendants, as their bankers; and before the said 24th of May a bill of exchange, drawn by one T. Dutton upon Sewell & Cross, bearing date the 21st of March, 1827, for 198*l.* 19*s.*, payable two months after date to the order of T. Dutton, and indorsed by the said T. Dutton, and also by C. Heginbotham and one J. Harris, and purporting to be accepted by Sewell & Cross, payable at the plaintiffs', was paid to the defendants by Sanderson & Co., to their credit with the defendants; and upon the said 24th of May the defendants presented the said bill to the plaintiffs, and required them to pay the same according to the said acceptance, and that the plaintiffs, believing the acceptance to be that of Sewell & Cross, paid to the defendants the sum of 198*l.* 19*s.* as the amount of the bill of exchange so purporting to be accepted as aforesaid; that on the 25th day of May (being the day next following the day on which such payment was made) the plaintiffs discovered that the acceptance on the bill was not the acceptance of Sewell & Cross, but that the same was forged by T. Dutton, the drawer of such bill; that the said acceptance was in fact so forged; and that on the said 25th of May, about one o'clock, the plaintiffs gave notice to the defendants and to J. Harris, the indorser, and to Sanderson & Co., that the same was so forged; and that the said payment had been made by them under a mistake, and in ignorance of the acceptance being so forged, and they requested the defendants to repay them the said sum of 198*l.* 19*s.*; and on the same day one Thomas Gates, as attorney for

the Bankers' Society for Protection against Forgers, and of which society the plaintiffs and defendants were members, sent the following letter to C. Heginbotham, the other indorser, and also a like one to J. Harris: — "Sir, a bill of exchange, bearing your indorsement, for 198*l.* 19*s.*, drawn by Thomas Dutton, and purporting to be accepted by Sewell & Cross, and indorsed by you to J. Harris, due yesterday, has been refused payment, and now lies with me, the acceptance being forged; and if the same is not taken up by ten o'clock to-morrow, legal proceedings will be taken against all parties." The sum of 198*l.* 19*s.* was entered by the plaintiffs in the day-book, to the debit of Sewell & Cross, but was not carried into the ledger or further charged to their account; Sanderson & Co. did not draw out of the hands of the defendants any sum of money upon the credit of or in respect of the said bill, and the balance of monies belonging to Sanderson & Co., in the hands of the defendants as their bankers, both before and at and after the several days before mentioned, greatly exceeded the said sum of 198*l.* 19*s.*

R. V. Richards for the plaintiff.

Pollock for the defendant.

Bayley, J., now delivered the judgment of the court.

This was an action brought by Cocks & Co., bankers in London, to recover a sum of money paid by them to the defendants, on the ground that they, having paid the money in mistake and ignorance of the facts, were entitled to recover it back. The bill was presented the 24th of May, the day on which it became due. The plaintiffs paid it, not knowing that it was not the genuine acceptance of Sewell & Cross. On the following day it was discovered that the acceptance was a forgery, and the plaintiffs on that day gave notice to the defendants. It was insisted that the plaintiffs were not entitled to recover, because they, being bankers, ought, before they paid the bill, to have satisfied themselves that the acceptance was genuine. On the other hand it was said that the plaintiffs, having given notice of the forgery to the defendants on the day next after the bill had been paid, were entitled to recover back the money, on the ground that they had paid the money under a mistaken supposition that the acceptance was the genuine acceptance of Sewell & Cross, and the case of Wilkinson *v.* Johnston[1] was relied on. That case differs from the present in one material point, viz., that the notice of the forgery was given on the very day when payment was made, and so as to enable the defendant to send notice of the dishonor to the prior parties on that day. In this case we give no opinion upon the point, whether the plaintiffs would have been entitled to recover if notice of the forgery had been given to the defendants on the very day on which the bill was paid, so as to enable the defendants on that day to have sent notice to other parties on the bill. But we are all of opinion that the holder of a bill is entitled to know, on the day when it

[1] 3 B. & C. 428.

becomes due, whether it is an honored or dishonored bill, and that, if he receive the money and is suffered to retain it during the whole of that day, the parties who paid it cannot recover it back. The holder, indeed, is not bound by law (if the bill be dishonored by the acceptor) to take any steps against the other parties to the bill till the day after it is dishonored. But he is entitled so to do, if he thinks fit, and the parties who pay the bill ought not by their negligence to deprive the holder of any right or privilege. If we were to hold that the plaintiffs were entitled to recover, it would be in effect saying that the plaintiffs might deprive the holder of a bill of his right to take steps against the parties to the bill on the day when it becomes due.

Judgment for the defendants.

LEATHER *v.* SIMPSON.

IN CHANCERY, BEFORE SIR R. MALINS, V. C., JANUARY 26, 1871.

[*Reported in Law Reports*, 11 *Equity*, 398.]

THE plaintiffs, Messrs. Leather & Marriott, were cotton brokers at Liverpool, and the plaintiff, J. N. Beach, was a merchant at Liverpool; the defendant J. H. Simpson was the registered officer of the Bank of Liverpool, and the defendant J. Chapman was the registered officer of the Union Bank of London.

In August, 1870, the Bank of Liverpool held, as agents for the Union Bank of London, two bills of exchange, one for £3925 9*s.* 3*d.*, dated the 23rd of May, 1870, and the other for £4054 13*s.* 7*d.*, dated the 25th of May, 1870, both being payable sixty days after sight. The bills were drawn upon J. N. Beach by G. Shute, his correspondent at New Orleans, one being drawn against 251 bales of cotton and the other against 253 bales of cotton, shipped in the William Cummings.

The bills were presented to Beach for acceptance, and there was attached to the first bill the following memorandum: "The Union Bank of London holds bill of lading and policy for 251 bales of cotton, per William Cummings;" and to the other bill was attached a similar memorandum in respect of the 253 bales of cotton.

J. N. Beach accepted both bills of exchange, as he alleged, in the belief that the Union Bank of London had in their possession at the time the said bills of lading, and that the statements to that effect in the two memoranda were true; he stated that he would have refused to accept such bills of exchange if he had not believed that at the time of their being so presented for acceptance the Union Bank had valid bills of lading for the cotton, and that the proceeds of the sale of such cotton would be applicable to the payment of the bills of exchange. J. N. Beach did not see the documents referred to

in the memorandum when he accepted the two bills of exchange, nor did he demand an inspection of them.

Before the bills became due, J. N. Beach, with the assistance of Messrs. Leather & Marriott, retired the bills of exchange, and they paid between them £7969 0*s.* 6*d.*, the amount of the bills, less a small sum for rebate of interest, and thereupon the bills of exchange and two documents, purporting to be the bills of lading of the 251 bales and 253 bales of cotton, shipped per William Cummings, were delivered up to the plaintiffs by the Bank of Liverpool.

Upon receiving these documents, which appeared to be signed by G. E. Miller, as master of the ship William Cummings, the plaintiffs discovered that the signature to both bills of lading had been forged. The plaintiffs were therefore unable to obtain delivery of the cotton, the genuine bills of lading being held by other persons. The bill prayed a declaration that the defendants were bound in equity to repay to the plaintiffs the said sum of £7969 0*s.* 6*d.*

The defendants, by their answer, stated that the two bills of exchange were accepted by J. N. Beach without any condition or qualification whatever, and that the memoranda were attached to such bills of exchange in accordance with the usual custom of the Union Bank of London in dealing with those bills, which were called document bills. It was further stated that the Union Bank of London were the agents in this country of Messrs. Schuchardt & Sons of New York, by whom the two bills of exchange were received for value, and were forwarded to them for presentation and realization.

There was evidence to show that Shute was in the habit of sending consignments of cotton to J. N. Beach, and of drawing bills of exchange upon him against bills of lading, and also that a letter was received by J. N. Beach from Shute on the 23rd of May, 1870, intimating that these two consignments of cotton would be forwarded to him, and that bills of exchange would be drawn by Shute upon J. N. Beach in the usual manner.

Mr. *Cotton*, Q. C., Mr. *Bardswell*, and Mr. *J. P. Benjamin*, for the plaintiffs.

Mr. *Pollock*, Q. C., Mr. *Pearson*, Q. C., and Mr. *Jackson*, for the defendants.

Sir R. Malins, V. C. This case is one which in a remarkable manner illustrates the perils of commercial life. It is one of perfect good faith on both sides; and the question is, which of two innocent parties is to suffer by the fraud which has been committed by issuing forged bills of lading?

The claim on the part of the plaintiffs is rested upon this, that the plaintiff Beach accepted the bills on the faith of the representation made by the Union Bank of London, contained in the notes attached to the bills: "The Union Bank of London holds bill of lading and policy for 251 bales of cotton, per William Cummings." It is urged that that is a representation by

the bank that they hold a genuine bill of lading, and therefore that the person who is called upon to accept the bill will have the security of a document which will insure to him the delivery of 251 bales of cotton. Against that, it is said, there is no representation of genuineness; there is no guarantee. The bank do not undertake to say whether the bill of lading is good or not; they only say, "We have a bill of lading," the fair meaning of which may possibly be, "We have a document which on the face of it is a bill of lading." Nothing had occurred to excite their suspicion; they believed it to be a bill of lading, and they therefore called it so. Then does this amount to a representation that it was a genuine bill of lading? The question that arises is, whether, by this representation, the position of the plaintiffs has been in any way altered. Suppose the bill of lading had been forwarded with the bill of exchange, which is the usual course of business. It is perfectly clear, I apprehend, that the plaintiff Beach would not have accepted this bill without the bill of lading accompanying it, if it had been in the hands of parties unknown to him, and who were not so responsible as he knew the Union Bank to be. The representation of the Union Bank that they had the bill of lading was a sufficient assurance to the plaintiff Beach that that bill of lading would be forthcoming in proper time. He therefore gives credence to their representation, and acts upon the faith of it; but does this make the case different from what it would have been if the bill of lading had actually been forwarded? I cannot come to the conclusion that this puts the plaintiffs in a different situation from that in which they would have been if the bill of lading had accompanied the bill of exchange. If it had so accompanied the bill of exchange, would Beach have accepted it? The best proof that he would is this, that on the 2nd of August, when the plaintiffs are desirous of having the cotton, the bill of lading is put into their hands; they pay the money on the faith of it; they take the bill of exchange and the bill of lading in the perfect belief that it is a genuine document, make no inquiry with regard to it, take it to the captain of the ship, and then, for the first time, discover that they have been imposed upon, as all parties engaged in the transaction had been. Was there then, a guarantee by the Union Bank? It would be a very dangerous thing for a bank if, where they say they have a document of that kind, they were to be held to guarantee its genuineness. My opinion is, they do nothing of the kind. I think the plaintiff Beach, if the matter had been the subject of the slightest degree of suspicion, ought to have required to see the bills of lading before he accepted the two bills of exchange, in order to test the signature, and see that they were perfectly safe. That is the course which he might have taken, but did not. In my opinion, the plaintiffs are precisely in the same position as they would have been if the bills of lading had been produced before the bills of exchange were accepted, and they are therefore in the same situation as if this bill of exchange had had annexed to it the bill of lading, and had then been accepted

in the belief that the bill of lading was a genuine document. It certainly is of the highest importance to the commercial interests of this country that discredit should never be thrown upon a bill of exchange if it be possible to avoid it. No doubt there are in this court instances, not so much of commercial bills as bills of exchange, which young men are in the habit of accepting, upon which this court will always stay an action where a proper case is made for doing so, but it must be a very peculiar case. What would have been the position of the parties if they had discovered this fraud (as they did on the 2nd of August) before they wanted the cotton? They would have said this: "Beach was induced to accept the bill of exchange by fraud; it is not binding." And if they are entitled to recover the money back, as they now seek in this suit to do, it is perfectly clear they would, before they paid the money, have been entitled to get the bill of exchange itself back. But that is a point which is absolutely settled by the case of Thiedemann *v.* Goldschmidt.[1] I am not able to see that there is a shadow of difference between Thiedemann *v.* Goldschmidt and the present case, except this, that here the money was actually paid before maturity, on a rebate of interest, and there the bill remained out. In Thiedemann *v.* Goldschmidt, Vice-Chancellor STUART ordered the bill of exchange to be delivered up to be cancelled. The case afterwards came before the full Court of Appeal, consisting of the Lord Chancellor CAMPBELL, Lord Justice KNIGHT BRUCE, and Lord Justice TURNER, who held that there was no equity for the delivery up of the bill.

That is precisely the position that the present parties would have been in if they had filed a bill to have the acceptances delivered up. If in that case, therefore, there was no equity to have the bill delivered up, it is, in my opinion, a decision that in this case the plaintiffs have no equity to have the money back. With regard to the case of Robinson *v.* Reynolds,[2] that was said to turn very much on the question of pleading; but I am not able to look upon it in the same way. It is a precisely similar case. Lord DENMAN'S judgment, confirmed by the Court of Exchequer Chamber, is perfectly distinct. Lord DENMAN says: "The plea does not show that the plaintiffs" — that is, the holder of the bill, the person who obtained the acceptance on the belief of the genuineness of the bill of lading — "made any representation which they knew to be false, nor that they warranted the bill of lading to be genuine, nor does it disclose that the defendants accepted the bill of exchange on which the action is brought upon the faith of any assertion by the plaintiffs, farther than their indorsement upon it, that the bill of lading, which turned out to be forged, was genuine. On the contrary, it appears by the other averments in the plea, that the drawer of the bill was the correspondent of the defendants, and that it was upon his authentication of the bill of lading, as referring to goods which he professed to have consigned to them, that they acted."

[1] 1 Giff. 142.

[2] 2 Q. B. 196, 202.

Now, I think the observations there are very applicable to the present case. Shute was the correspondent of the plaintiff Beach at Liverpool. He informed him by letter that he was going to send the cotton by the William Cummings. It arrives by that ship, and it was the usual course of dealing with the plaintiff Beach that whenever he accepted these bills drawn by Shute he had the bill of lading. Therefore he expected that there would be a bill of lading coming from his own correspondent Shute. And so far from the Union Bank misleading Beach, I am of opinion that Beach could only have understood it in one way, — that Shute had transmitted a bill of lading, and the bank had that bill of lading, which would be forwarded for inspection if required. If the bill was accepted, then the bill of lading would be handed over when the bill arrived at maturity, and when the acceptor was called on to pay it. Therefore, I think, to say that there was any misleading by the Union Bank is attempting to carry the case far beyond anything that the facts warrant.

At to the general law of misrepresentation, I do not think it necessary to go into it in this case, because the law is perfectly clear, that if the court was warranted in treating this as a representation by the Union Bank of London, as if they had said, "We hold the bill of lading, which is a genuine bill of lading, or which we guarantee to be a genuine bill of lading" — then if they had so undertaken, and it turned out to be a bad bill of lading, it would have been money obtained on a representation which was untrue; and the rules of this court are settled, that when a representation in a matter of business is made by one man to another calculated to induce him to adapt his conduct to it, it is perfectly immaterial whether the representation is made knowing it to be untrue, or whether it is made believing it to be true, if, in fact, it was untrue; because every man making a representation inducing another to act on the faith of that representation must make it good if he takes upon himself to represent that which he does not know to be true, and he is equally bound if he made it without knowing it to be untrue. Therefore, if the memorandum relied upon had amounted to a representation that the document was genuine or a guarantee, the consequence would be plain that the plaintiffs must have been indemnified by the Union Bank of London, and the money they have received must have been returned, because it was obtained upon a representation which turns out to be untrue. If there be a distinction between this case and the cases of Thiedemann *v.* Goldschmidt[1] and Robinson *v.* Reynolds,[2] I confess it appears to me to be rather more unfavorable to the plaintiffs, because in Thiedemann *v.* Goldschmidt the money had not been paid, whereas here they elected to pay the money on a rebate of interest before the bill became due, which precludes them from saying that it had not arrived at maturity. The plaintiff Beach trusted to his own correspondent Shute, that he would not transmit anything but a genuine bill of lading.

[1] 1 De G. F. & J. 4. [2] 2 Q. B. 196.

The equities between these parties are equal; the parties are equally innocent in the transaction; they have all been imposed upon; but there is this difference, that one of them, by the course of the transaction, has been in possession of the money, and I am at a loss to see any ground upon which I can be justified in making a decree that that money should be restored. I can see no distinction between a bill filed to have the acceptance delivered up before it has arrived at maturity, and a bill filed to have the money restored after the bill has arrived at maturity, or has been treated as having arrived at maturity, and the amount of it paid.

Upon these grounds I am of opinion that the bill fails, and must be dismissed.

CANAL BANK *v.* BANK OF ALBANY.

IN THE SUPREME COURT OF NEW YORK, MAY, 1841.

[*Reported in* 1 *Hill*, 287.]

ASSUMPSIT, to recover money paid on a draft, tried at the Albany circuit, in 1840, before CUSHMAN, C., Judge. The draft was drawn on the plaintiffs by the Montgomery County Bank, payable to the order of E. Bentley, Jr. It purported to have been indorsed successively by Bentley, then by one Budd, afterward by the Bank of New York, and lastly by the defendants, to whom the plaintiffs paid it. The payment of it was made on the 28th of March, 1839. The ground on which the plaintiffs sought to recover back the money was, that the indorsement purporting to be that of Bentley was a forgery, which fact was proved by Bentley and others on the trial.

On the 7th of June, 1839, the plaintiffs' attorney called on the defendants, and asked to have the money refunded, notifying them at the same time of the forgery.

When the plaintiffs offered Bentley as a witness, the defendants objected, insisting that he was incompetent, as being interested. The objection was overruled, and Bentley permitted to testify; whereupon the defendants excepted.

The defendants offered to prove, and the plaintiffs admitted, that they (defendants) received the draft from the Bank of New York to collect, as agents for the latter, and that as such they received the money and paid it over to their principals, before notice of the forgery. The defendants, however, never disclosed their agency to the plaintiffs till called on by the plaintiffs' attorney, as above mentioned, and notified of the forgery.

The defendants further offered to show a uniform custom of the banks of this State, to receive and collect drafts in the manner this was done,

without disclosing their agency. The plaintiffs objected, on the ground of irrelevancy, and the judge overruled the offer, to which the defendants again excepted.

A verdict having been rendered for the plaintiffs, the defendants now moved for a new trial on a bill of exceptions, presenting the above, and some other points.

S. Stevens for the defendants.

I. Harris for the plaintiffs.

By the Court, COWEN, J. It is not perceived what advantage, direct or remote, Bentley can derive from the plaintiffs' recovery, nor what he can lose by their failure. It is said, the plaintiffs will hold the money to be recovered in trust for the witness. This is not so. Their recovery or failure will neither add to nor take from their liability to him. Their recovery will not, as the defendants' counsel supposes, estop them to deny that Bentley's name was forged. The record and proceedings here would not, as such, be any evidence whatever between him and the plaintiffs. The whole is but a more solemn admission of the forgery; and his being sworn as a witness adds nothing to its strength in his favor. Should he sue the Montgomery County Bank, and should they plead payment, they would have the same right to contest the forgery as if this suit had never been; nor could any of the proceedings here be used as evidence against the witness, even though the plaintiffs should fail to establish the forgery against these defendants.

On the merits, there was nothing in the nature of the transaction to conclude the plaintiffs against showing the forgery. They had done no act giving currency to the bill on the strength of Bentley's name. Even had they accepted it on the day when it was drawn, the defendants could have holden them concluded only in respect to the genuineness of the drawer's name, he being their immediate correspondent.[1] And the act of payment could amount to no more.[1] Neither acceptance nor payment, at any time, nor under any circumstances, is an admission that the first, or any other indorser's name is genuine.[2] In point of title, then, the case of the defendants was the same as if the name of Bentley had not appeared on the bill. They have obtained money of the plaintiffs without right, and on the exhibition of a forged title as a genuine one. The plaintiffs paid their money under the mistaken belief thus induced, that the name was genuine. To a note or bill payable to order, none but the payee can assert any title without the indorsement of such payee; not even a *bona fide* holder.[3]

But it is said, the equities of the parties are equal, and the defendants having possession must prevail. No doubt the parties were equally innocent in a moral point of view. The conduct of both was *bona fide*, and the negligence or rather misfortune of both the same. It was the duty, or,

[1] Chit. Bills, 7 Am. Ed. 336.

[2] Chit. Bills, 7 Am. Ed. 628.

[3] Chit. Bills, 7 Am. Ed. 286, 286, *a*, 430.

more properly, a measure of prudence, in each to have inquired into the forgery, which both omitted. But this raises no preference at law or equity in favor of the defendants, but against them. They have obtained the plaintiffs' money without consideration; not as a gift, but under a mistake. For the very reason that the parties were equally innocent, the plaintiffs have the right to recover; and that was conceded throughout, in the authority cited on another point by the defendants' counsel. United States Bank *v.* Bank of Georgia.[1] The whole course of argument and authority in that case went on the fault of the party who paid the money. It was likened to the case of a bank paying a check, on which the name of the drawer was forged, which was again assimilated to the acceptance of a bill of exchange, where the drawer's name is forged. It was said that, in such cases, the payor or acceptor takes upon himself the knowledge of his correspondent's handwriting, and shall be concluded. Even that is going a great way, unless some *bona fide* holder has purchased the paper on the faith of such an act. But it is sufficient to distinguish the case, that it goes on the superior negligence of the party paying or accepting. At page 355, the court draws an express distinction between the effect of acceptance or payment as a recognition of the drawer's and the indorser's handwriting. It is said, the forgery of an indorsement is not a fact which the acceptor is presumed to know. And perhaps the decision in the case cited should be rested entirely on negligence in the Bank of Georgia. United States Bank *v.* Bank of Georgia;[2] also the case of the Gloucester Bank *v.* The Salem Bank.[3]

But, it is said, the plaintiffs here delayed giving notice of the forgery, from the 28th of March till the 7th of June. Under what circumstances, is not disclosed; for the point of delay was not made at the trial. That is a sufficient reason why it should not be listened to here. But I am not willing to concede that delay in the abstract, as seems to be supposed, can deprive the party of his remedy to recover back money paid under the circumstances before us. It is said, the defendants had indorsers behind them; and by delay, they were prevented from charging them, by giving seasonable notice. Admit this to be so; the plaintiffs did not stand in the relation of a holder. They were the drawees, and advanced the money by way of payment. They would never, therefore, think of notice to the defendants, till they accidentally discovered the forgery. If there had been any unreasonable delay after such discovery, another question would be presented. I infer from the rigor of the case cited by the defendants' counsel, Cocks *v.* Masterman,[4] that he would exact as great, indeed greater diligence in giving notice, than is necessary to fix an indorser. There, the plaintiffs had paid to the defendants, the holders, an acceptance, purporting to be in the name of the plaintiffs' customers. The bill was drawn

[1] 10 Wheat. 333, 354.
[2] 10 Wheat. 344.
[3] 17 Mass. 33, cited; 10 Wheat. 350.
[4] 9 B. & C. 902.

payable at the plaintiffs' bank. The next day, discovering the forgery, they, on the same day, gave notice to the defendants and the indorsers. This was held too late. The court even declined to give an opinion, whether notice on the very day of payment would have entitled the plaintiffs to recover; but held, that notice on the very day was at all events necessary, and that short of this the plaintiffs were not entitled to recover. They said, the holder must not, by want of notice, be deprived of the right to take steps against the parties to the bill, on the very day when it was paid; and they admitted that this was requiring one day's increased diligence, beyond what would have been required in the ordinary case of dishonor. In the latter case, they allowed that notice on the next day would have been in season. In a previous case of payment under the like circumstances, notice having been given on the very day, the bankers who paid for their customers were allowed to recover. Wilkinson *v.* Johnston.[1] In this earlier case, the payment was made for the honor of indorsers, whose bankers the plaintiffs were. Both cases were treated by the court as standing on the same principles, though, in the later case, they do not put it distinctly on any principle. In the earlier case, they said the plaintiffs were not the drawees, or acceptors, nor the agents of any supposed acceptors. The same thing may, I take it, be said of the later case, though the plaintiffs assumed to pay for the acceptors. They could scarcely have intended to pay as mere agents for the acceptors, an act which would have extinguished the bill, and cut them off from a remedy against the drawers and indorsers. Where a bill or note is payable at a bank, and no express direction given by the principal to the bank, on its coming in with indorsers, the bank, of course, takes the paper as a purchaser or holder; and for its own indemnity, presents it to the principal for payment on the very day, or as soon as may be. Thus, there is a good chance to detect the forgery of his name; and hurry the notices to the other parties. Whatever forgeries there may be, are soon brought to light. In the earlier of the two cases cited, the court said, "The general rule of law is clear and not disputed, viz., that money paid under a mistake of facts may be recovered back as being paid without consideration." In the later case, the court do not deny the rule, nor that it would apply to the case before them. But to enforce it, they require an almost impracticable diligence. I doubt whether this case can be sustained, except upon its own peculiar circumstances, if it can be sustained at all. In all the previous cases, where a recovery had been denied, there was carelessness, or delay, or both. Smith *v.* Mercer,[2] was much like Cocks *v.* Masterman, and there had been a neglect to discover the forgery and give notice, for a week's time. The case of Price *v.* Neal,[3] was one of palpable neglect, in both payment and delay. Some other cases turn on similar principles. Barber *v.* Gingell;[4] United States Bank *v.* Bank of Georgia, and Gloucester Bank *v.* Salem Bank,

[1] 3 B. & C. 428. [2] 6 Taunt. 76. [3] 3 Burr. 1354. [4] 3 Esp. 60.

before cited; Levy *v.* Bank of United States.[1] If Cocks *v.* Masterman is to be followed, it must, I think, be on the same principle. The plaintiffs paid on the faith of their correspondents' name. The former were not named as drawees; but they had a superior knowledge of their correspondents' handwriting, which they neglected to exert. It might, therefore, have been reasonable to require that they should overcome the objection of neglect, by such a speedy movement as to save all possible advantages to the holder, against the prior parties. But, where each party enjoys only the same chance of knowledge, no case demands anything more than reasonable diligence in giving notice, after a discovery of the forgery. The common case of paying forged bank notes, is one instance. And navy and victualling bills have been treated as standing on the same footing. Jones *v.* Ryde;[2] Bruce *v.* Bruce.[3] These are cases of transferring notes from one to another, which turn out to be unavailable by reason of a forgery, in respect to which both parties are equally ignorant, the one being no more guilty of neglect than the other; indeed, neither being negligent, but both being imposed upon under the exercise of ordinary diligence. At all events, it does not lie with the payor to complain of the very neglect imputable to himself. Neglect to give notice, after discovering the forgery, is another matter.[4] If the indorsers are to be charged, as such, why should not the accidental delay in discovering the forgery, on a paid bill especially, operate as an excuse for not giving them immediate notice?

The defendants did not disclose their agency, and must, therefore, as between them and the plaintiffs, be taken to have acted as principals. They obtained the money of the plaintiffs on a bill of exchange, payable to the order of Bentley, under a forged indorsement of his name. Money has been successively paid by mistake of the several indorsees, the plaintiffs, the defendants, the Bank of New York, etc., and the remedy by each is plain. It is by action over, each against his respective indorser. The bill has never been put in a regular course of negotiation, for want of Bentley's name. No one who has advanced money on it, therefore, obtained what he supposed he had got; and the indorsers, beside being liable as such, may each be sued, as having received money without consideration.

The proof offered relative to the custom of banks to collect paper received by them as agents, without communicating the name of their principal, would have disclosed a case in which it would be apparent that the defendants might or might not have been agents. The object of the proposed proof was, to supply the want of direct evidence that notice of the agency had been given by them at the time. Till they had superadded proof of another custom, for banks never so to receive paper and collect as principals, the proposed evidence could have had no tendency to affect the plaintiffs with such notice. Knowledge that the defendants might be

[1] 1 Binn. 27; s. c. 4 Dall. 234.
[2] 5 Taunt. 488.
[3] 5 Taunt. 495, note.
[4] Chit. Bills, Am. Ed. 463.

acting as agents, was not enough. That is so of every man ostensibly transacting business as a principal. Mills *v.* Hunt.[1] The proof offered and rejected was, therefore, irrelevant.

New trial denied.

THE BANK OF COMMERCE *v.* THE UNION BANK.

In the Court of Appeals of New York, April, 1850.

[*Reported in* 3 *Comstock*, 230.]

The Bank of Commerce brought assumpsit in the Superior Court of the City of New York, against the Union Bank, to recover money paid by mistake. On the trial before Sanford, J., the case was this: —

On the 18th of December, 1847, the New Orleans Canal and Banking Company drew a draft on the Bank of Commerce in New York, payable to the order of "J. Durand," for one hundred and five dollars. After the draft was issued it was fraudulently altered in several respects, and among others, by the substitution of the word "thousand" for "hundred," and the name "Bonnet" instead of "Durand," so that it appeared to be a draft for one thousand and five (instead of one hundred and five) dollars, and payable to the order of J. Bonnet (instead of J. Durand). In this altered condition, and bearing the indorsement "J. Bonnet," the Union Bank in New York received the draft from the State Bank of Charleston for collection, and credited the amount to that bank. The Bank of Commerce, on the draft being presented by the Union Bank, paid it to the latter. Two days afterwards the Bank of Commerce received advices from the New Orleans Canal and Banking Company, and then ascertained the alterations in the draft. Thereupon the draft was returned to the Union Bank, and the money, which had been paid, demanded; but payment was refused.

The evidence being closed, the court charged the jury that if they were satisfied the draft had been altered, in the manner before mentioned, after it was issued by the drawers, and that the plaintiffs paid the amount of it, as altered, by mistake, and without knowledge of or reason to suspect the alterations, they were entitled to recover the amount of money so paid. Also that the rule requiring a banker to know the handwriting of his customer, as to the signature to a check or draft, did not extend to the filling up of the body thereof; and that paying the draft in question under the circumstances was not of itself evidence of any negligence or want of due caution on the part of the plaintiffs. There was an exception to the charge, and to the refusal of the court to charge certain propositions as requested. The plaintiffs had a verdict for $1035.38, which the Superior

[1] 20 Wend. 433.

Court refused to set aside, and after judgment the defendants appealed to this court.

H. Ketchum for appellants.

B. D. Silliman for respondents.

RUGGLES, J., delivered the opinion of the court.

The payment of a bill of exchange by the drawee is ordinarily an admission of the drawer's signature, which he is not afterwards, in a controversy between himself and the holder, at liberty to dispute; and therefore if the drawer's signature is on a subsequent day discovered to be a forgery, the drawee cannot compel the holder to whom he paid the bill, to restore the money, unless the holder be in some way implicated in the fraud. Price *v.* Neal.[1] This rule is founded on the supposed negligence of the drawee in failing by an examination of the signature, when the bill is presented, to detect the forgery and refuse payment. The drawee is supposed to know the handwriting of the drawer, who is usually his customer or correspondent. As between him, therefore, and an innocent holder, the payor, from this imputed negligence, must bear the loss. In Price *v.* Neal, the plaintiff had paid to Neal, the holder, two bills of exchange, purporting to be drawn on him by Sutton, whose name was forged. On discovery of the forgery, Price brought his action against Neal, to recover back the money as paid by mistake. Lord MANSFIELD, in delivering the opinion of the court in favor of the defendant, said, "It was incumbent upon the plaintiff to be satisfied that the bill drawn upon him was the drawer's hand before he accepted or paid it, but it was not incumbent upon the defendant to inquire into it." "Whatever neglect there was, was on his side. It is a misfortune which has happened without the defendant's fault or neglect."

In Wilkinson *v.* Lutwidge,[2] Lord Chief Justice PRATT was of opinion that "acceptance was a sufficient acknowledgment of the drawer's handwriting on the part of the acceptor, who must be supposed to know the hand of his own correspondent." So the acceptance of a bill, whether general, or for honor, or *supra* protest, after sight of the bill, admits the genuineness of the signature of the drawer; and consequently if the signature of the drawer turns out to be a forgery, the acceptance will nevertheless be binding, and entitle a *bona fide* holder for value and without notice to recover thereon according to its tenor.[3]

But it is plain that the reason on which the above rule is founded does not apply to a case where the forgery is not in counterfeiting the name of the drawer, but in altering the body of the bill. There is no ground for presuming the body of the bill to be in the drawer's handwriting, or in any handwriting known to the acceptor. In the present case, that part of the bill is in the handwriting of one of the clerks in the office of the Canal and Banking Company in New Orleans. The signature was in the name and handwriting of the cashier. The signature is genuine. The forgery

[1] 3 Burr. 1354. [2] 1 Stra. 648. [3] Story on Bills, § 262.

was committed by altering the date, number, amount, and payee's name. No case goes the length of saying that the acceptor is presumed to know the handwriting of the body of the bill, or that he is better able than the indorsers to detect an alteration in it. The presumption that the drawee is acquainted with the drawer's signature, or able to ascertain whether it is genuine, is reasonable. In most cases it is in conformity with the fact. But to require the drawee to know the handwriting of the residue of the bill, is unreasonable. It would, in most cases, be requiring an impossibility. Such a rule would be not only arbitrary and rigorous but unjust. The drawee would undoubtedly be answerable for negligence in paying an altered bill, if the alteration were manifest on its face. Whether it was so or not in this case was properly submitted to the jury, who found that it was paid by mistake and without knowledge of, or reason to suspect the fraudulent alterations. It would have been difficult to find otherwise upon the evidence, the bill having passed through the defendants' bank, and the Charleston bank without suspicion. If the forgery had been in the name of the drawer, it might not perhaps have been incumbent on those banks to scrutinize the bill, because they might have relied on the drawee's better knowledge of the hand; but the forgery being in the body of the bill the plaintiffs were not more in fault than the defendants.

The greater negligence in a case of this kind is chargeable on the party who received the bill from the perpetrator of the forgery. So far as respects the genuineness of the bill each indorsee receives it on the credit of the previous indorsers; and it was the interest and duty, in the present case, of the Bank of Charleston, to satisfy itself that the bill was genuine, or that its immediate indorser was able to respond in case the bill should prove to be spurious. The party who fraudulently passed the bill cannot avoid his liability to refund on the pretence of delay in detecting the forgery, or in giving notice of it; and if reasonable diligence is exercised in giving notice after the forgery comes to light it is all that any of the parties can require. Canal Bank *v.* The Bank of Albany.[1]

In Smith *v.* Mercer,[2] in Cocks *v.* Masterman,[3] and in Price *v.* Neal,[4] the plaintiffs who paid the forged bills, being chargeable with a knowledge of the signature of the drawer (which was forged), were held to have paid it negligently and without due caution and examination, and on that ground it was that the defendants to whom they paid the money were held not liable without immediate notice of the forgery. But in the present case, no such negligence is imputable to the plaintiffs, the plaintiffs being no more capable of detecting the forged alteration by inspection of the bill, than either of the other parties.

This action is not founded on the bill as an instrument containing the contract on which the suit is brought. The acceptor can never have

[1] 1 Hill, 287, 292, 3.
[2] 6 Taunt. 76.
[3] 9 B. & C. 902.
[4] 3 Burr. 1354.

recourse on the bill against the indorsers. But the plaintiffs' right of recovery rests on equitable grounds. In The Canal Bank *v.* The Bank of Albany, the principle was recognized that money paid by one party to another through mutual mistake of facts in respect to which both were equally bound to inquire, may be recovered back. The defendants here as in that case have obtained the money of the plaintiffs without right and on the exhibition of a forged title as genuine, the forgery being unknown to both parties. The defendants ought not in conscience to retain the money, because it does not belong to them; and for the further reason that the defendants and the previous indorsers have, each, on the same principle, their remedy over against the party to whom they respectively paid the money, until the wrongdoer is finally made to pay. If that party should be irresponsible, or if he cannot be found, the loss ought to fall on the party who, without due caution, took the bill from him.

In cases where no negligence is imputable to the drawee in failing to detect the forgery, the want of notice within the ordinary time to charge the previous parties to the bill, is excused, provided notice of the forgery be given as soon as it is discovered.[1]

Judgment affirmed.

GODDARD *v.* THE MERCHANTS' BANK.

In the Court of Appeals of New York, October, 1850.

[*Reported in* 4 *Comstock*, 147.]

Appeal from the Superior Court of the city of New York, where Goddard and St. John brought assumpsit against the Merchants' Bank, to recover back money paid by mistake. On the 15th of September, 1847, a man calling himself E. S. Moore presented to the Bank of Rutland, in Vermont, a draft as follows: —

$1000. Cleveland, Ohio, Aug. 28, 1847.

Canal Bank,

Pay to order of E. S. Moore, one thousand dollars, value received, which place to the account of

S. H. Mann, Cashier.

To American Exchange Bank, N. Y.
No. 214.

The man calling himself Moore indorsed the draft to the Bank of Rutland, and received $1000 for it. He was not seen or heard of afterwards, and his residence was unknown. The drawer's name to the draft was forged.

The Bank of Rutland sent the draft, for collection, to the Farmers' Bank

[1] Espy *v.* Bank of Cincinnati, 18 Wall. 604; White *v.* Continental National Bank, 64 N. Y. 316, *accord*. *Conf.* Langton *v.* Lazarus, 5 M. & W. 629. — Ed.

of Troy, and that bank forwarded it for collection to the defendants' bank in New York, by which it was received on Saturday, Sept. 18, 1847. On the same day the defendants placed the draft in the hands of Mr. Campbell, a notary, who presented it for payment at the American Exchange Bank (the drawees); the teller of which refused payment for want of funds of the drawer. The plaintiffs, Goddard & St. John, were the correspondents in New York of the Canal Bank at Cleveland; and on Monday morning, Goddard called at the office of the notary where the draft was, and left his check for the amount, but did not then see the draft, in consequence of the absence of the notary. On the following day, Goddard, on seeing the draft pronounced it a forgery. Notice was immediately given to the defendants, and repayment of the money demanded, which they refused. The circumstances attending the payment of the draft, and affecting the question of negligence on the part of the plaintiffs, are sufficiently detailed in the opinion of BRONSON, J.

The plaintiffs recovered in the Superior Court, and the defendants appealed to this court.

B. W. Bonney for appellants.

H. E. Davies for respondent.

BRONSON, C. J., delivered the opinion of the court.

The drawee of a bill is held bound to know the handwriting of his correspondent, the drawer; and if he accepts or pays a bill in the hands of a *bona fide* holder for value, he is concluded by the act, although the bill turns out to be a forgery. If he has accepted, he must pay; and if he has paid, he cannot recover the money back. This is an exception to the general rule, that money paid under a mistake of fact may be recovered back. The exception is fully established; but I do not see that it applies to this case. As the plaintiffs intervened and paid the bill for the honor of the supposed drawers, I do not doubt that the exception would have applied to them, as well as to the drawees, had they seen the bill before they parted with their money; but they had not seen it. They had had no opportunity of judging whether the bill was in the handwriting of their correspondents, the drawers, or not; and consequently the argument which concludes the drawee when he pays after sight of the bill proves nothing against the plaintiffs. Their case is out of the exception, and within the general rule; and I see no reason why they should not recover.

But it is said that the plaintiffs are chargeable with negligence, in paying the draft before they had seen it; also that they prevented the service of notices of protest on Monday the 20th of September, the last day for giving notice; and consequently they cannot recover. How are the facts? The plaintiffs were informed on the Monday morning in question that there was a draft for $1000 drawn by their correspondents, the Canal Bank of Cleveland, on the American Exchange Bank; that it had been protested on Saturday, and was then in the hands of Notary Campbell. This infor-

mation they got from the teller of the American Exchange Bank, the teller of the Merchants' Bank, and from Mr. Riker, another notary, who occupied the same office with Mr. Campbell, and who received papers and answered questions for Mr. Campbell when he was absent from the office, as he was when Goddard, one of the plaintiffs, called to take up the draft. On this information Goddard acted; and supposing that the Canal Bank had by mistake drawn on the Exchange Bank, with which it had just before kept an account, instead of drawing on the plaintiffs, and wishing to protect the credit of the drawers, he left a check with Mr. Riker for the amount of the draft and notary's fees, for the purpose of taking up the draft, and requested to have it sent to the plaintiffs' office on that day, which Mr. Riker said would be done, or that he would tell Mr. Campbell that the plaintiffs wanted the draft sent down. Riker delivered the check and did the errand when Campbell came in. Campbell took the check and paid the money to the defendants; but instead of sending the draft to the plaintiffs, he put it in his trunk and kept it until Tuesday morning, when Goddard called and inquired for it. On seeing the draft Goddard immediately pronounced it a forgery, and thereupon went to the defendants' bank and demanded back the money. Now in all this I am unable to see anything like culpable negligence on the part of Goddard. He was told that there was such a draft, — importing, of course, that it was a genuine draft. He got the information from the defendants' teller, and also from Mr. Riker, who received papers and answered questions for Mr. Campbell, to whose hands the defendants had intrusted the draft. But it is not necessary to connect the defendants with the information. When Goddard went to the notary's office, he told Mr. Riker he had been informed — not by the supposed drawers, but by persons in New York — that Mr. Campbell had a draft in his hands drawn by the Canal Bank of Cleveland; and he left a check to take up such a draft, — meaning of course a genuine draft. Neither Campbell nor his principals, the defendants, had any right to the check, except for the purpose of taking up a genuine draft; and when Campbell received the check and paid it over to the defendants, both he and they tacitly affirmed that the draft was genuine. Independently of the implied obligation to send the draft to the plaintiffs on that day, it would have been an act of prudence on the part of the defendants, or their agent the notary, to send it. But when we take into consideration the request that the draft should be sent, which was communicated to the notary when he received the check, it is clear that whatever of negligence there was in the transaction was all on the other side, and not on the side of the plaintiffs.

It is true that if the plaintiffs had not intervened, the notices would have been sent off on Monday, which was in time, instead of Tuesday, which was too late. But it is also true that had the notary performed the implied condition on which he received the check, and sent the draft to the

plaintiffs on that day, he would either have learned that the draft was a forgery in time to give legal notice, or the plaintiffs would have concluded themselves by holding the draft, without declaring the forgery, until it was too late to give legal notice.

There was in truth no use in giving notice of the dishonor of the bill, with the view of charging any party to it. The defendants only had it for collection, and wanted no recourse. Notice to the supposed drawers could serve no purpose, because the bill was a forgery: and Moore, the payee, who forged the bill, was answerable to the Bank of Rutland, which he had defrauded, without notice.

It is said that early notice would have increased the probability of catching the felon. Let us examine that suggestion. If the plaintiffs had not intervened, notice would have been sent on Monday; but it would have been notice of protest, and not of the forgery. The Bank of Rutland would have heard nothing about a forgery, until it should have got a response from the notice of protest sent to the Canal Bank in Ohio. There would have been a delay of a week at the least. Whereas as the case was, notice of the forgery, as well as of protest, was sent off the next day, both to the Bank of Rutland and the Canal Bank. From this view of the case it seems reasonable to believe, that what was in fact done was more likely to prove beneficial to the Bank of Rutland, which owned the bill, than the thing which would have happened if the plaintiffs had done nothing.

But whatever may be the probability, or whoever else may be in fault, I think the plaintiffs have neither done any wrong, nor neglected any duty; and am of opinion that the judgment should be affirmed.

RUGGLES, J., dissenting. Acceptance or payment of a bill of exchange or check by the drawee is an admission of the drawer's signature, which the drawee is not at liberty afterwards to contradict, as against a *bona fide* holder of the bill. The drawer is supposed to be the drawee's correspondent and acquaintance, with whose signature he is familiar, and negligence is therefore imputed to the drawee when he pays a bill to which the drawer's name is forged. The duty of ascertaining whether the drawer's signature is genuine before acceptance or payment by the drawee, is imposed on him for the benefit and safety of the holder, who is entitled to know without delay after the presentment of the bill, whether it is accepted, or if payable at sight, whether it is paid. This knowledge is necessary to enable the holder to take immediate measures against the previous indorsers and drawer, who are liable if the bill be dishonored.

It being the duty of the drawee to satisfy himself of the genuineness of the bill before he accepts or pays, and it being important to the holder and other previous parties that he should do so, it is settled that he accepts or pays at his peril. If he accepts he is bound to pay, although the drawer's signature turn out to be forged; and if he pays he cannot recover back his money, unless the forgery is discovered and notice given immediately, or

within such time as to give the holder the same advantage of proceeding against the party from whom he received the bill, as if it had been dishonored. Price *v.* Neal;[1] Smith *v.* Chester;[2] Smith *v.* Mercer;[3] Wilkinson *v.* Johnston;[4] Cocks *v.* Masterman.[5] The latter case seems to enforce the rule with too much rigor, because in case of the payment of a forged bill, it requires the discovery of the forgery to be made and notice given on the same day, so as to give to the holder even earlier information of the forgery than he would have been entitled to upon the protest of the bill for non-payment.

The drawee is entitled to see the bill, and to have an opportunity to examine and inspect it, and if necessary to inquire as to the drawer's signature, before he is bound to accept or pay, and it is his duty to exercise a due and proper caution, not only for his own sake but for the sake of the holder, who is not supposed to have the same means of detecting a forgery in the drawer's name, as are possessed by the drawee. It is not unreasonable to require the drawee to ascertain at his peril whether the bill is genuine before he accepts or pays. He incurs no responsibility to the drawer by refusing to accept, where there is reasonable ground of doubt; while by accepting or paying under such circumstances, the holder is induced to release his vigilance against the party from whom he took the bill, and may thereby lose the opportunity of compelling payment from him in case the bill should turn out a forgery. The rule, therefore, which requires that the drawee should by all the means in his power satisfy himself as to the drawer's signature before he accepts or pays, being reasonable and necessary, should not be departed from, or frittered away by exceptions resting on slight grounds.

The plaintiffs were not the drawees of the bill, but they were the friends and correspondents of the supposed drawers, and paid the bill for their honor. They stand in no better position in regard to the point in question, than if they had been the drawee; they were equally bound to see and examine the bill, and to decide at their peril as to its being genuine. See cases above referred to. They were no more entitled than the drawees to put the holder's right in danger, by negligent payment of a forged bill. When Mr. Goddard paid the bill he knew that the account between the Canal Bank of Cleveland and the American Exchange Bank had been closed. This appears from a passage in his letter to the Canal Bank, of the 21st of September. The fact that the draft purported to be drawn on a bank with which the drawees had discontinued their dealings, ought, it seems to me, to have awakened the suspicions of Mr. Goddard in relation to the draft, so far at least as to have induced him to look at it before he paid the money. Instead of that, however, he paid it without having seen it, and as it seems to me, without the excuse of a want of opportunity to

[1] 3 Burr. 1354. [2] 1 T. R. 654. [3] 6 Taunt. 76.
[4] 3 B. & C. 428. [5] 9 B. & C. 902.

see it. The draft was presented at the American Exchange Bank for payment on Saturday, the 18th of September, when payment was refused. Having heard of the draft from the teller of the Merchants' Exchange Bank, and ascertained that it was in the hands of the notary, he called at the notary's office on Monday morning before the notary had come in, for the purpose of paying the draft, and made known his business to Mr. Riker, whom he found there. He was requested to wait a few minutes until the notary came, but declined doing so, and left his check with Mr. Riker to be handed to the notary for the payment of the draft, requesting that the notices of protest which had been prepared should not be sent out, and they were withheld accordingly. The plaintiff might without any difficulty have seen the bill. It was not withheld by the notary. The plaintiff might have obtained it during the day by calling or sending to the notary's office, in season to have discovered the forgery and to have despatched the notices to the previous parties. It is true the notary was requested to send the bill to the plaintiff's office, and that this was not done; but this was a request addressed to the courtesy of the notary, and not a demand which he had a right to make, or with which the notary was bound to comply. If Mr. Goddard's business made it inconvenient for him to call for the bill, it might be equally inconvenient for the notary to send it. There was no obligation on the part of the notary to send it. Riker, who was in the notary's office, does not swear that he promised to send it, or told him it would be sent. He thinks he said that the draft would be sent down, or that he would tell the notary that Goddard wanted it sent down. This is no proof of a promise to send it; and Mr. Goddard, in his letter to the Bank at Cleveland, states that he requested it to be sent, but does not pretend that Riker undertook to send it or held out any expectation that it would be sent. The evidence forms, in my opinion, no excuse to the plaintiffs for not having exercised the usual and necessary caution of looking at the bill before they paid the money.

The plaintiff's counsel insist that negligence in paying the draft unseen, is not imputable to the plaintiffs, because payment was made on the defendants' representation through their agent, the notary, that there was a draft of the Canal Bank in existence when in fact there was not. But this reason is unsound. The holder of an indorsed draft, as we have before seen, has not the means of knowing whether the drawer's signature is genuine or not; but the drawee has. The holder looks to the drawee for information on that point, and the drawee does not look to the holder. The drawee, on accepting or paying, answers that inquiry at his peril. There was in fact, in this case, no representation that the draft was genuine. The presentment of a draft is not such a representation. If it were so, it would always excuse payment without sight of the paper, and would subvert the rule on this subject which has been long settled and rests on the soundest reasons.

What were the consequences of the negligence of the plaintiffs, in paying the bill without having seen the bill? The forgery was discovered on the next day, as soon as Mr. Goddard inspected the bill, and it would have been detected on Monday, before payment, if he had acted with the ordinary caution, of seeing the bill on that day, as he might, without any difficulty, have done. In that case, it would have been the notary's duty to have informed the Bank of Rutland of the forgery, by letter of the same day, and this we are to presume would have been done. But the plaintiffs, on Monday, paid the bill without having seen it, and thus stopped the notice of the forgery; and the Bank of Rutland lost the advantage of a day's time in taking measures to compel the repayment of the money from Moore. The delay of a day is as effectual to discharge the holder of a bill under such circumstances, as the delay of a month or a year. It is only in those cases in which the drawee pays the bill without fault on his part, that the failure to give strict notice is excused. Such was the case in The Canal Bank *v.* The Bank of Albany. The indorser's name was in that case forged, and the drawee had no better opportunity to know or to ascertain this than the holders. Both stood in respect to the exercise of vigilance, on the same footing. And so in the case of The Bank of Commerce *v.* The Union Bank, decided at the last term, where the body of the bill had been altered, but the signature was genuine, it was held that negligence was not imputable to the drawee in paying the bill, because, although he was bound to know or ascertain the verity of the signature, it was not so as to the body of the bill, as to which it was no more incumbent upon him than upon the holder, to discover the forgery. Neither of those cases excuses neglect on the part of the drawee, in taking the usual care and precaution against paying a forged bill. Both those decisions rest on the ground that there was no negligence or fault to be imputed to the drawees, and in that respect they differ entirely from the present. This is a case of money paid by mistake; but by a mistake which happened through the negligence of the party who paid it; a mistake which in cases of this nature, must jeopardize the rights of the holder of the bill, and which for that reason ought not, on grounds of public policy, to be made the foundation of a claim to have the money restored. Mistake by the drawee in paying a forged bill, without negligence on his part, excuses the want of notice until the forgery is discovered. But mistake arising from the drawee's carelessness in paying a forged bill without sight, when the sight of the bill would have disclosed the forgery, is no excuse for the want of notice or the delay in giving it.

In the present case, it is evident, that if Mr. Goddard had looked at the bill on Monday, the 20th of September, the forgery would have been discovered on that day; and the Rutland Bank would have had notice in time to have caused the arrest of Moore at Cleveland. The letter which the Rutland Bank sent to the bank at Cleveland, describing his person, arrived there, notwithstanding the delay in the notice of the forgery, on

the same day that a person answering to that description had offered a forged certificate of deposit at that bank, but who could not be found after the arrival of the letter. Although it is not necessary in the present case to show that the Bank of Rutland sustained actual damage by the delay, this circumstance exemplifies the propriety of the rule which requires vigilance on the part of the drawee, for the benefit and safety of the prior parties to the bill.

This is perhaps a hard case upon the plaintiffs; but I am of opinion that they cannot be permitted to recover, without overthrowing valuable and well-settled principles of commercial law.

JEWETT, J., concurred with RUGGLES, J.

And thereupon the judgment of the Superior Court was affirmed.

McKLEROY *v.* SOUTHERN BANK OF KENTUCKY.

IN THE SUPREME COURT OF LOUISIANA, MAY, 1859.

[*Reported in* 14 *Louisiana Annual Reports*, 458.]

APPEAL from the Fourth District Court of New Orleans, PRICE, J.

Clark & Bayne for plaintiffs and appellants.

Thomas Hunton for defendants.

LAND, J. The evidence in this case establishes the following facts, viz.:

The plaintiffs were the factors of James Smith, a cotton planter, residing in the State of Arkansas. One John Zimmer, who had for a few months been a private tutor in Smith's family, assuming the name of John Belmont, forged a draft on the plaintiffs, in the name of Smith, as follows: —

$986. HOMESTEAD, November 5th, 1857.

On the 15th December, 1857, pay to the order of John Belmont nine hundred and eighty-six dollars, value received, and charge the same to the account of JAS. SMITH.

TO MESSRS. MCKLEROY & BRADFORD, NEW ORLEANS, LA.

Zimmer also forged a letter of introduction, in the name of Smith, to Shotwell & Son, of Louisville, Kentucky, as follows: —

HOMESTEAD, Nov. 5, 1857.

MESSRS. SHOTWELL & SON.

GENTLEMEN: — I introduce to you Mr. John Belmont, a gentleman who resided in my family as our tutor. Having been sick, he is now travelling to improve his health. I gave him a draft on McKleroy & Bradford, my commission house in New Orleans, which he is desirous to get cashed in

your city. If you can give Mr. Belmont any assistance, by perhaps recommending my draft, as Mr. Belmont is a stranger in your city, and not yet fully recovered, you will greatly oblige me.

I am, gentlemen, yours respectfully,

JAMES SMITH.

The house of Shotwell & Son had been in correspondence with James Smith for about twelve years; and being deceived by the forger, indorsed the draft for the purpose of enabling the holder to negotiate it. The draft, bearing the indorsements of John Belmont and of Shotwell & Son, was presented for discount at the Branch of the Southern Bank of Kentucky, and being considered good, was purchased by the bank. The draft was remitted to the Louisiana State Bank, with the following additional indorsement upon it, — "Pay to R. J. Palfrey, cashier, J. B. Alexander, cashier." The draft thus indorsed was presented to plaintiffs for acceptance by the Louisiana State Bank, and was accepted on the last of November, or first of December, and was paid at maturity, on the eighteenth of December, 1857, by the plaintiffs to the agent of the Southern Bank of Kentucky. In January, 1858, James Smith, being in the city, made known to the plaintiffs, upon an examination of his account with them, that the draft was a forgery. Mr. Shotwell, of the house of Shotwell & Son, was in this city at the time, and was immediately sent for, and the fact of forgery communicated to him. On the 9th of January, 1858, the plaintiffs gave formal notice by letter, of the forgery, to A. L. Shotwell & Son, to the Southern Bank of Kentucky, and also the Louisiana State Bank.

This suit was instituted by the plaintiffs to recover back the money paid on the draft, on the ground of payment in error.

There was judgment for the defendant, and the plaintiffs have appealed.

The District Judge held, that the acceptance of a bill of exchange admits the genuineness of the drawer's signature, and that where an acceptor has paid to a *bona fide* holder of a forged draft or bill, having no notice of the forgery, he cannot recover back the money paid, although the forgery is established by the most conclusive evidence. And where one of two innocent persons must suffer, he who has misled the other, or has omitted his duty, must bear the loss.

These principles of law are well established, and admit, perhaps, of neither doubt nor controversy, and if applicable to this case, must determine the rights of the parties.

The defendant became the holder of the draft before it was accepted by the plaintiffs, and before they had any knowledge of its existence, and consequently before the defendant had any right of action against them for its recovery. The plaintiffs, therefore, had done no act which induced the defendant to believe the signature of the drawer to be genuine, at the time the bill was purchased. How, then, can it be said that the defendant pur-

chased the bill on the faith of the plaintiffs' acceptance, or on their guarantee of the genuineness of the drawer's signature? Or how can it be said that the plaintiffs misled the defendant at the time of the purchase of the bill, or was then guilty of the omission of any duty toward the defendant as the purchaser of the bill?

If the defendant had purchased the bill on the faith of the acceptance of plaintiffs, or had sustained any loss in consequence of their negligence, we would have no difficulty in affirming the judgment of the lower court; but such are not the facts made known to us by the record.

The defendant purchased the bill on the faith of the indorsement of Shotwell & Son, which was a warranty of the genuineness of the drawer's signature to the bank; and there is no good reason, why the accidental payment made by the plaintiffs should inure to the benefit of the defendant.

Mr. Chitty says on this subject, "If he [the holder] thought fit to rely on the bare representation of the party from whom he took it [the bill], there is no reason that he should profit by the accidental payment, when the loss had already attached upon himself, and why he should be allowed to retain the money, when, by an immediate notice of the forgery, he is enabled to proceed against all other parties, precisely the same as if the payment had not been made, and consequently, the payment to him has not in the least altered his situation, or occasioned any delay or prejudice. It seems that, of late, upon questions of this nature, these latter considerations have influenced the court in determining whether, or not, the money shall be recoverable back; and it will be found, on examining the older cases, that there were facts affording a distinction, and that upon attempting to reconcile them they are not so contradictory as might on first view have been supposed."[1]

The facts in this case afford the distinction to which Mr. Chitty refers, and takes the case out of the general rule, which prevents the acceptor of a bill of exchange from recovering back the money paid in cases of forgery of the drawer's signature.

The loss had already attached before the bill was either accepted or paid, and the acceptors gave immediate notice to the defendant, and Shotwell & Son, after ascertaining for the first time, from James Smith, in whose name the bill was drawn, the fact of forgery.

The evidence shows that plaintiffs accepted the bill, in the language of the witness, "chiefly through the respectability of the channels through which it came." It is, therefore, difficult to conceive upon what principle of equity or right the defendant can be permitted to retain the money paid in error by the plaintiffs, upon the facts of this case. No authority applicable to the particular circumstances of this case has been cited by the

[1] Chitty on Bills, 461.

defendant's counsel, and we have no hesitation in reversing the judgment upon the authority of Mr. Chitty, above quoted.

In a case like the present, the acceptor is not estopped from proving the forgery of the bill.

It is, therefore, ordered, adjudged, and decreed, that the judgment of the lower court be avoided and reversed; and it is now ordered, adjudged, and decreed, that the plaintiffs do have and recover of the defendant the sum of nine hundred and eighty-six dollars, with five per cent per annum interest, from the 18th day of December, 1857, with costs in both courts.

HOFFMAN & CO. *v.* BANK OF MILWAUKEE.

IN THE SUPREME COURT OF THE UNITED STATES, DECEMBER, 1870.

[*Reported in* 12 *Wallace*, 181.]

ERROR to the Circuit Court for the District of Wisconsin; the case being thus: —

Chapin & Miles, a forwarding and commission firm in Milwaukee, were engaged in moving produce to Hoffman & Co., of Philadelphia, for sale there. The course of their business was thus: They first shipped the produce, obtaining a bill of lading therefor, to which they attached a draft drawn by them on their consignee for about the value of the grain, and then negotiated the draft with bill of lading attached, to some bank in Milwaukee, and obtained the money. It was understood that the draft was drawn upon the credit of the property called for by the bill of lading, and would be paid by the consignee upon receipt of the bill of lading; and — with perhaps a single exception where the bills of lading, not being obtained during bank hours, were sent otherwise than with the draft — the drafts were accompanied by such bills. The Philadelphia firm, however, rarely knew what flour belonged to any particular bill of lading; not being obliged by the railroad clerks at Philadelphia, where they were known, to exhibit any bill of lading in order to get the flour, and their custom being, on getting notice from the railroad office that flour had arrived for them, to pay the charges, give receipts, and send their drayman for it, and bring it away. It was the practice of the Milwaukee firm to advise their Philadelphia correspondents by letter of shipments made and drafts drawn, which advisements were acknowledged with a promise "to honor the drafts." When flour was "slow" in going forward they corresponded with the Milwaukee house about it, but did not on that account refuse acceptance or payment of any bill.

Having been thus dealing for about sixteen months, Chapin & Miles drew three drafts on Hoffman & Co., in the ordinary way, and attaching to them

bills of lading which they had forged, negotiated, in the ordinary course of business, the drafts, with the forged bills of lading attached, to the City Bank of Milwaukee, getting the money for them. The bank knew nothing of the forgery of the bills of lading. The ordinary correspondence between the two houses took place. That in regard to one draft will exhibit its character.

MILWAUKEE, February 26th, 1869.

MESSRS. HOFFMAN & CO., PHILADELPHIA.

DEAR SIRS, — We ship to you to-day 200 bbls. "Prairie Flour," and draw at s't for $1100, which please honor. Will draw for $5 only when we can, but must crowd $5½ part of the time.

Yours, truly,

CHAPIN & MILES.

PHILADELPHIA, March 2d, 1869.

MESSRS. CHAPIN & MILES.

GENTLEMEN, — Yours 26th ult. here. Your draft $1100 will be paid, but we think you should try to keep them down to $5 per barrel. We advise sale of 100 Prairie, at $7, and 54, at $7.25.

Yours, respectfully,

HOFFMAN & CO.

No flour was forwarded. The Milwaukee bank forwarded the drafts, however, with the forged bills of lading attached, to their correspondent, the Park Bank in New York, for collection. The Park Bank forwarded the same to its correspondent, the Commonwealth Bank of Philadelphia, for the same purpose, and the latter bank presented the draft and bill of lading to the drawees, Hoffman & Co., who, knowing the drafts to be genuine, and not supposing that the bills of lading were otherwise, paid the drafts to the Philadelphia Bank, which remitted the money back to the Park Bank to the credit of the Bank of Milwaukee.

No flour coming forward, Hoffman & Co. discovered that the bills of lading were forged, and Miles & Chapin being insolvent, they sued the Bank of Milwaukee to recover the amount paid, as above stated.

The declaration in the case contained the common counts in assumpsit, with a notice attached to the defendant, "that the action was brought to recover $3100, money paid by the plaintiff, under mistake of fact, upon drafts and bills of lading (of which copies were annexed), the mistake being that the plaintiffs paid the money upon the belief that the said bills of lading were genuine instruments; whereas, in fact, they were forged; the amount of money paid being the amount called for by the drafts, which was paid upon the credit and inducement of the bills of lading."

Neither the name of the defendant, the Milwaukee Bank, nor of any of its officers or agents, appeared in or upon the bills of lading in question,

and had it not been for extrinsic evidence, it could not have been told from those bills that the bank had had anything to do with them. Nor had the bank had any dealings or correspondence of any kind with the Philadelphia house, relative to the shipments of flour by Chapin & Miles, or relative to the drafts drawn by them.

On this case the court below directed the jury to find for the bank, defendant in the case, and the plaintiffs brought the case here.

Mr. *M. H. Carpenter,* for the plaintiff in error.

Mr. *J. W. Cary,* for the defendant in error.

Mr. Justice CLIFFORD delivered the opinion of the court.

Acceptors of a bill of exchange, by the act of acceptance admit the genuineness of the signatures of the drawers, and the competency of the drawers to assume that responsibility. Such an act imports an engagement, on the part of the acceptor, to the payee or other lawful holder of the bill, to pay the same, if duly presented, when it becomes due, according to the tenor of the acceptance. He engages to pay the holder, whether payee or indorsee, the full amount of the bill at maturity, and if he does not, the holder has a right of action against him, and he may also have one against the drawer. Drawers of bills of exchange, however, are not liable to the holder, under such circumstances, until it appears that the bill was duly presented, and that the acceptor refused or neglected to pay the same according to the tenor of the instrument, as their liability is contingent and subject to those conditions precedent.

Three bills of exchange, as exhibited in the record, were drawn by Chapin, Miles & Co., payable to the order of the defendants, and the record shows that they, the defendants, received and discounted the three bills at the request of the drawers. Attached to each bill of exchange was a bill of lading for 200 barrels of flour, shipped, as therein represented, by the drawers of the bills of exchange, and consigned to the plaintiffs; and the record also shows that the drawers, in each case, sent a letter of advice to the consignees apprising them of the shipment, and that they would draw on them as such consignees for the respective amounts specified in the several bills of exchange. Prompt reply in each case was communicated by the plaintiffs, acknowledging the receipt of the letter of advice sent by the shippers, and promising to honor the bills of exchange, as therein requested. Evidence was also introduced by the plaintiffs showing that the defendants indorsed the bills of exchange and forwarded the same, with the bills of lading attached, to the National Park Bank of the City of New York, their regular correspondent; that the same were subsequently indorsed by the latter bank, and forwarded to the Commonwealth Bank of Philadelphia for collection; that the Commonwealth Bank presented the bills of exchange, with the bills of lading attached, to the plaintiffs, as the acceptors, and that they paid the respective amounts as they had previously promised to do, and that the Commonwealth Bank remitted the proceeds

in each case to the National Park Bank, where the respective amounts were credited to the defendants. Proof was also introduced by the plaintiffs showing that each of the bills of lading was a forgery, and that the plaintiffs, before the commencement of the suit, tendered the same and the bills of exchange to the defendants, and that they demanded of the defendants, at the same time, the respective amounts so paid by them to the Commonwealth Bank. Payment as demanded being refused, the plaintiffs brought an action of assumpsit against the defendants for money had and received, claiming to recover back the several amounts so paid as money paid by mistake, but the verdict and judgment were for the defendants, and the plaintiffs sued out a writ of error, and removed the cause into this court. Testimony was also introduced by the defendants tending to show that the shippers were millers; that they made an arrangement with the plaintiffs to ship flour to them at Philadelphia for sale in that market, the plaintiffs agreeing that they, the shippers, might draw on them for advances on the flour, to be reimbursed out of the proceeds of the sales; that for more than a year they had been in the habit of shipping flour to the plaintiffs under that arrangement and of negotiating drafts on the plaintiffs to the banks in that city, accompanied by bills of lading in form like those given in evidence in this case; that the drafts, with the bills of lading attached, were sent forward by the banks, where the same were discounted, and that the same were paid by the plaintiffs; that the drawers of the drafts in every case notified the plaintiffs of the same, and that the plaintiffs, as in this case, answered the letter of advice and promised to pay the amount. They also proved that the drawers of the drafts in this case informed their cashier that the same would always be drawn upon property, and that the bills of lading would accompany the drafts, and that they had no knowledge or intimation that the bills of lading were not genuine. Instructions were requested by the plaintiffs, that if the jury found that the respective bills of lading were not genuine, they were entitled to recover the several amounts paid to the Commonwealth Bank, with interest; but the court refused to give the instruction as prayed, and instructed the jury that if they found the facts as shown by the defendants, the plaintiffs could not recover in the case, even though they should find that the several bills of lading were a forgery.

Money paid under a mistake of facts, it is said, may be recovered back as having been paid without consideration, but the decisive answer to that suggestion, as applied to the case before the court, is that money paid, as in this case, by the acceptor of a bill of exchange to the payee of the same, or to a subsequent indorsee, in discharge of his legal obligation as such, is not a payment by mistake nor without consideration, unless it be shown that the instrument was fraudulent in its inception, or that the consideration was illegal, or that the facts and circumstances which impeach the transaction, as between the acceptor and the drawer, were known to the

payee or subsequent indorsee at the time he became the holder of the instrument.[1]

Such an instrument, as between the payee and the acceptor, imports a sufficient consideration, and in a suit by the former against the latter the defence of prior equities, as between the acceptor and the drawer, is not open unless it be shown that the payee, at the time he became the holder of the instrument, had knowledge of those facts and circumstances.

Attempt is made in argument to show that the plaintiffs accepted the bills of exchange upon the faith and security of the bills of lading attached to the same at the time the bills of exchange were discounted by the defendants. Suppose it was so, which is not satisfactorily proved, still it is not perceived that the concession, if made, would benefit the plaintiffs, as the bills of exchange are in the usual form and contain no reference whatever to the bills of lading, and it is not pretended that the defendants had any knowledge or intimation that the bills of lading were not genuine, nor is it pretended that they made any representation upon the subject to induce the plaintiffs to contract any such liability. They received the bills of exchange in the usual course of their business as a bank of discount and paid the full amount of the net proceeds of the same to the drawers, and it is not even suggested that any act of the defendants, except the indorsement of the bills of exchange in the usual course of their business, operated to the prejudice of the plaintiffs or prevented them from making an earlier discovery of the true character of the transaction. On the contrary, it distinctly appears that the drawers of the bills of exchange were the regular correspondents of the plaintiffs, and that they became the acceptors of the bills of exchange at the request of the drawers of the same, and upon their representations that the flour mentioned in the bills of lading had been shipped to their firm for sale under the arrangement before described.

Beyond doubt the bills of lading gave some credit to the bills of exchange beyond what was created by the pecuniary standing of the parties to the same, but it is clear that they are not a part of those instruments, nor are they referred to either in the body of the bills or in the acceptance, and they cannot be regarded in any more favorable light for the plaintiffs than as collateral security accompanying the bills of exchange.

Sent forward, as the bills of lading were, with the bills of exchange, it is beyond question that the property in the same passed to the acceptors when they paid the several amounts therein specified, as the lien, if any, in favor of the defendants was then displaced and the plaintiffs became entitled to the instruments as the muniments of title to the flour shipped to them for sale, and as security for the money which they had advanced under the arrangement between them and the drawers of the bills of ex-

[1] Fitch *v.* Jones, 5 El. & Bl. 238; Arbouin *v.* Anderson, 1 Ad. & E. N. S. 498; Smith *v.* Braine, 16 Q. B. 244; Hall *v.* Featherstone, 3 H. & N. 287

change. Proof, therefore, that the bills of lading were forgeries could not operate to discharge the liability of the plaintiffs, as acceptors, to pay the amounts to the payees or their indorsees, as the payees were innocent holders, having paid value for the same in the usual course of business.[1]

Different rules apply between the immediate parties to a bill of exchange — as between the drawer and the acceptor, or between the payee and the drawer — as the only consideration as between those parties is that which moves from the plaintiff to the defendant; and the rule is, if that consideration fails, proof of that fact is a good defence to the action. But the rule is otherwise between the remote parties to the bill, as, for example, between the payee and the acceptor, or between the indorsee and the acceptor, as two distinct considerations come in question in every such case, where the payee or indorsee became the holder of the bill before it was overdue and without any knowledge of the facts and circumstances which impeach the title as between the immediate parties to the instrument. Those two considerations are as follows: First, that which the defendant received for his liability, and, secondly, that which the plaintiff gave for his title, and the rule is well settled that the action between the remote parties to the bill will not be defeated unless there be an absence or failure of both these considerations.[2]

Unless both considerations fail in a suit by the payee against the acceptor, it is clear that the action may be maintained, and many decided cases affirm the rule, where the suit is in the name of a remote indorsee against the acceptor, that if any intermediate holder between the defendant and the plaintiff gave value for the bill, such an intervening consideration will sustain the title of the plaintiff.[3]

Where it was arranged between a drawer and his correspondent that the latter would accept his bills in consideration of produce to be shipped or transported to the acceptor for sale, the Supreme Court of Pennsylvania held,[4] that the acceptor was bound to the payee by his general acceptance of a bill, although it turned out that the bill of lading forwarded at the same time with the bill of exchange was fraudulent, it not being shown that the payee of the bill was privy to the fraud. Evidence was introduced in that case showing that the payee knew what the terms of the arrangement between the drawer and the payee were, but the court held that mere knowledge of that fact was not sufficient to constitute a defence, as the payee was not a party to the arrangement, and was not in any respect a surety for the good faith and fair dealing of the shipper.

[1] Leather *v.* Simpson, L. R. 11 Eq. 398.

[2] Robinson *v.* Reynolds, 2 Q. B. 202; Same *v.* Same, in error, 2 Q. B. 210; Byles on Bills (5th Am. Ed.), 124; Thiedemann *v.* Goldschmidt, 1 De G. F. & J. 10.

[3] Hunter *v.* Wilson, 4 Exch. 489; Boyd *v.* McCann, 10 Me. 118; Howell *v.* Crane, 12 La. Ann. 126; Watson *v.* Flanagan, 14 Tex. 354.

[4] Craig *v.* Sibbett *et al.*, 15 Pa. 240.

Failure of consideration, as between the drawer and acceptor of a bill of exchange, is no defence to an action brought by the payee against the acceptor, if the acceptance was unconditional in its terms, and it appears that the plaintiff paid value for the bill, even though the acceptor was defrauded by the drawer, unless it be shown that the payee had knowledge of the fraudulent acts of the drawer before he paid such value and became the holder of the instrument.[1]

Testimony to show that the payees were not *bona fide* holders of the bills would be admissible in a suit by them against the acceptors, and would constitute, if believed, a good defence, but the evidence in this case does not show that they did anything that is not entirely sanctioned by commercial usage. They discounted these bills and they had a right to present them for acceptance, and having obtained the acceptance they have an undoubted right to apply the proceeds collected from the acceptors to their own indemnity.[2]

Forgery of the bills of lading would be a good defence to an action on the bills if the defendants in this case had been the drawers, but they were payees and holders for value in the regular course of business, and the case last referred to, which was decided in the Exchequer Chamber, shows that such an acceptance binds the acceptor conclusively as between them and every *bona fide* holder for value.

Very many cases decide that the drawee of a bill of exchange is bound to know the handwriting of his correspondent, the drawer, and that if he accepts or pays a bill in the hands of a *bona fide* holder for value, he is concluded by the act, although the bill turns out to be a forgery. If he has accepted he must pay, and if he has paid he cannot recover the money back, as the money, in such a case, is paid in pursuance of a legal obligation as understood in the commercial law.[3]

Difficulty sometimes arises in determining whether the plaintiff, in an action on a bill of exchange, is the immediate promisee of the defendant, or whether he is to be regarded as a remote party, but it is settled law that the payee, where he discounts the bill at the request of the drawer, is regarded as a stranger to the acceptor in respect to the consideration for the acceptance; consequently, if the acceptance is absolute in its terms and the bill is received in good faith and for value, it is no answer to an action by him that the defendant received no consideration for his acceptance or that the consideration therefor has failed; and it is immaterial in that behalf whether the bill was accepted while in the hands of the drawer and

[1] United States *v.* Bank of Metropolis, 15 Pet. 393.

[2] Thiedemann *v.* Goldschmidt *et al.*, 1 De G. F. & J. 10; Robinson *v.* Reynolds, 2 Q. B. 211.

[3] Goddard *v.* Merchants' Bank, 4 Comst. 149; Bank of Commerce *v.* Union Bank, 3 Comst. 234; Bank of the United States *v.* Bank of Georgia, 10 Wheat. 348; Price *v.* Neal, 3 Burr. 1355.

at his request, or whether it had passed into the hands of the payee before acceptance and was accepted at his request.[1]

Certain other defences, such as that the payments were voluntarily made, and that the title to the bills at the time the payments were made was in the National Park Bank, were also set up by the defendants, but the court does not find it necessary to examine those matters, as they are of the opinion that the payments, if made to the payees of the bills, as contended by the plaintiffs, were made in pursuance of a legal obligation and that the money cannot be recovered back.[2]

Judgment affirmed.

NATIONAL BANK OF NORTH AMERICA OF BOSTON *v.* EDWARD D. BANGS and Another.

In the Supreme Judicial Court of Massachusetts, March, 1871.

[*Reported in* 106 *Massachusetts Reports*, 441.]

Contract against the members of the firm of E. D. & G. W. Bangs & Company, to recover back money paid by the plaintiffs on a forged check; submitted to the judgment of the court on these facts agreed: —

"The defendants, on September 21, 1869, took of some person (whom they do not remember, and did not remember when they were first notified of the alleged forgery, and could not then tell whether he was a stranger to them or a person known to them) in good faith and for full value, in payment for gold sold by them in the usual course of their business, a check payable to their order, of which the following is a copy: —

"$1,308.63. National Bank of North America. Boston, Sept. 21, 1869. Pay to the order of E. D. & G. W. Bangs & Co., Thirteen hundred eight dollars and sixty-three cents.

"No. 932. William D. Bickford.

"On said September 21, the defendants deposited this check, with others, and with their other moneys, in the Maverick National Bank of Boston, where they kept their deposits; and before depositing it, for the purpose of enabling the Maverick National Bank to collect the check from the National Bank of North America, and in accordance with the usage of depositors of checks payable to order, they indorsed it in blank by writing on the back of it 'E. D. & G. W. Bangs & Co.' The Maverick National Bank the next

[1] Parsons on Bills, 179; Munroe *v.* Bordier, 8 C. B. 862.

[2] Young *et al. v.* Lehman *et al.*, 63 Ala. 519; First National Bank of Detroit *v.* Burhham, 32 Mich. 323 *accord.* See also Goetz *v.* Bank of Kansas City, 119 U. S. 551. — Ed.

day presented the check at the clearing-house, when it was allowed and paid to the Maverick National Bank by the National Bank of North America in the usual manner of settling the daily balances of banks at the clearing-house.

"The Maverick National Bank, on the day of deposit, credited the defendants with the amount of the check in its account with them; and the National Bank of North America on September 22, debited William D. Bickford, in whose name the check purported to have been drawn, and who was a customer of and a depositor in the National Bank of North America, and had funds on deposit there, with the amount of the check. The check was retained by the National Bank of North America until the 1st or 2d of October, 1869, when it was sent with other checks, by the National Bank of North America, to William D. Bickford, with the monthly statement of his account, according to the usage of banks. Bickford, after examining the checks, pronounced this a forgery, and on the 4th of October informed the bank of it; and on the same day the defendants were notified by the National Bank of North America that the check was forged, which was the first intimation or suspicion they had that the check was forged. For the purposes of the hearing on this statement of facts, it is admitted that the check was a forgery."

Both banks were members of the Boston Clearing-House Association at the time of these transactions, and the constitution and by-laws of that association during the time were made a part of the statement, so far as they should be found material and competent. The substance of the rules of the clearing-house, so far as they are material, appears in the opinion.

"It was the usage for each bank belonging to the Clearing-House Association, each morning, at ten o'clock, to have at the clearing-house, for the purpose of effecting settlements with the other banks, all the checks and other demands, such as bills, etc., it had received against all the other banks during the preceding day; making them up into separate bundles for each bank, with a ticket containing the items and aggregate of the contents of each bundle. The settlement was made at the clearing-house upon the footings of these tickets, without regard to the fact whether the contents of the bundle were correctly ticketed, or formed good claims against the bank charged with the contents of the bundle as per ticket; and in from ten to fifteen minutes past ten o'clock the messenger from each bank was able to receive and take to his bank all the claims of the other banks against it. On the return of the messenger to his bank, the messenger delivers to the paying teller the various bundles of demands against the bank; and it was the usage for the paying teller, or some other officer of the bank charged with that duty, to immediately proceed to open and examine the contents of these bundles, ascertaining whether the contents of each bundle corresponded with the ticket, and whether each check was properly signed, drawn, and indorsed, and whether the drawers of the check

had funds deposited sufficient to meet the amounts drawn; and all this is completed before one o'clock of the same day; and all checks not then returned to the banks from which they were received are then charged to the drawers, in the same manner as if they had been presented and paid at the counter of the bank.

"It is agreed that the Bank of North America acted in good faith in the premises."

H. C. Hutchins and *H. H. Currier* for the plaintiffs.

W. A. Field for the defendants.

WELLS, J. This suit is brought to recover money paid upon a check purporting to be drawn by one Bickford upon the plaintiff bank, to the order of the defendants, indorsed by them, deposited with their banker, and collected through the clearing-house. The signature of the drawer proved to be a forgery. As the discovery of the forgery was not made in time to enable the plaintiff to return the check, as of absolute right, under the rules of the clearing-house, we think the case must stand as if the payment had been made directly at the plaintiff's counter, in the ordinary mode.

The right of return, secured by the rules of the clearing-house, is a special provision, in compensation for payment without inspection. Instead thereof, the rules give opportunity for subsequent inspection. When that has been had, the special rules cease to govern; and the rights of the paying bank rest upon the general principles of law. Boylston National Bank *v.* Richardson.[1] But, in applying those general principles, it was held in Merchants' National Bank *v.* National Eagle Bank,[2] that the drawee of a check, who paid it without inspection, under the provisions of the clearing-house rules, might recover back the money, if there had been no actual laches on the part of the drawee, and no change of position on the part of the holder; notwithstanding "the failure of the bank to return a check by one o'clock," as allowed by the rules. The failure in that case was by accident, and involved no neglect.

In this case, the money was paid to the use of the defendants. In making up and returning the monthly account of its depositor, the forgery was discovered, and made known to the plaintiff, and notice thereof was immediately given to the defendants. In this respect the case shows no laches on the part of the plaintiff, and no change of situation on the part of the defendants, which can defeat a recovery, if any right of recovery ever existed, or could arise from the payment in the manner stated. Merriam *v.* Wolcott;[3] Canal Bank *v.* Bank of Albany.[4]

If the suit were between the bank, or drawee, and a party who took the check in the usual course of business, finding it in circulation, or even by first indorsement from the payee, the loss would fall upon the bank; because, having greater means and opportunity to become familiar with the

[1] 101 Mass. 287. [2] 101 Mass. 281. [3] 3 Allen, 258. [4] 1 Hill, 287.

handwriting of their correspondents or depositors, the law presumes that drawees will know their signatures and be able to detect forgeries. From this presumption arises what is often called an obligation or responsibility on the part of the drawee of a bill or check, which prevents him from recovering back money paid upon it on the ground of a mistake of fact. Price *v.* Neal;[1] Levy *v.* Bank of the United States;[2] Bank of St. Albans *v.* Farmers' & Mechanics' Bank.[3] But this responsibility, based upon presumption alone, is decisive only when the party receiving the money has in no way contributed to the success of the fraud, or to the mistake of fact under which the payment was made. "If the loss can be traced to the fault or negligence of either party, it shall be fixed upon him." Gloucester Bank *v.* Salem Bank.[4] In the absence of actual fault or negligence on the part of the drawee, his constructive fault, in not knowing the signature of the drawer and detecting the forgery, will not preclude his recovery from one who has received the money with knowledge of the forgery, or who took the check, under circumstances of suspicion, without proper precautions, or whose conduct has been such as to mislead the drawee, or to induce him to pay the check without the usual scrutiny or other precautions against mistake or fraud.[5] These exceptions are implied by the very terms in which the general rule is ordinarily stated. The case of Ellis *v.* Ohio Insurance & Trust Co.[6] is an express decision to that effect, and contains an able and thorough discussion of the subject. We are aware of no case in which the principle that the drawee is bound to know the signature of the drawer of a bill or check, which he undertakes to pay, has been held to be decisive in favor of a payee of a forged bill or check to which he has himself given credit by his indorsement.

In the present case, the check had not gone into circulation, and could not get into circulation until it was indorsed by the defendants. Their indorsement would certify to the public, that is, to every one who should take it, the genuineness of the drawer's signature. Without it, the check could not properly be paid by the plaintiff. Their indorsement tended to divert the plaintiff from inquiry and scrutiny, as it gave to the check the appearance of a genuine transaction, to the inception of which the defendants were parties. Their names upon the check were apparently inconsistent with any suspicion of a forgery of the drawer's name.

But to the defendants the presentation, by a stranger or third party, of a check purporting to be drawn to their own order, which such third party proposed to negotiate to them for value, was a transaction which should have aroused their suspicions. It ought to have put them upon inquiry for explanations; and if inquiry had been properly made it would have disclosed the fraud and prevented its success. The case finds that they acted

[1] 3 Burr. 1354. [2] 1 Binn. 27. [3] 10 Verm. 141. [4] 17 Mass. 33, 42.
[5] Rouvant *v.* San Antonio National Bank, 63 Tex. 610, *accord.* — Ed.
[6] 4 Ohio St. 628.

in good faith. But that does not exclude such omission of due precautions as to deprive them of the right to throw the loss upon another party who acted in like good faith, and also without fault or want of due care.

It is possible that the defendants may have received the check under circumstances which would exonerate them from the imputation of any actual fault or neglect. But the agreed statement fails to disclose any such explanation. A majority of the court are therefore of opinion that the judgment must be for the plaintiff, for the amount of the check and interest from the time it was paid.

Ordered accordingly.

CYRUS CARPENTER AND OTHERS *v.* NORTHBOROUGH NATIONAL BANK.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, JULY 3, 1877.

[*Reported in* 123 *Massachusetts Reports*, 66.]

CONTRACT for money had and received. Trial in the Superior Court, before GARDNER, J., who, at the request of the plaintiffs, reported the case for the consideration of this court, in substance as follows: —

The plaintiffs had been engaged for many years in Boston, under the firm name of Cyrus Carpenter & Co., as manufacturers of ranges and furnaces. They had known Abraham Jackson and William Carpenter for several years, and had had business transactions with them. William Carpenter was a builder and owned some real estate and other property. Jackson had acted as his legal adviser, and held a power of attorney authorizing him to collect debts due William Carpenter and to sell and convey his land. It was alleged by the defendant, but denied by the plaintiffs, that William Carpenter had also given Jackson a power of attorney to make and execute promissory notes and to use his (Carpenter's) name in any business in which he (Carpenter) was engaged; and there was conflicting evidence on this point. William Carpenter had upon some occasions left with Jackson promissory notes, signed by him in blank, which Jackson had negotiated with the plaintiffs and others. Prior to the transaction in question, the plaintiffs had exchanged notes with Jackson and William Carpenter, sometimes for the accommodation of the former and sometimes for their own accommodation. About February 15, 1875, Jackson and William Carpenter obtained from the plaintiffs, for Jackson's accommodation, three promissory notes made by them, amounting in all to about $6400, one of which was for the sum of $2625. The plaintiffs received from Jackson and William Carpenter notes signed and indorsed by them in exchange for these notes. The notes were not identical in form but aggregated the same

amount. A few days afterwards Jackson called alone at the plaintiffs' place of business and stated to Cyrus Carpenter that he desired to get another note from the plaintiffs for $2625, and that he could place it at less rate of discount than the former note. Cyrus Carpenter thereupon gave him a note for $2625, signed by the plaintiffs, dated February 15, 1875, payable to the order of William Carpenter in four months from date, and Jackson gave him in exchange a note for the same amount, date and time, signed by himself to the order of William Carpenter and indorsed by William Carpenter. In April, 1875, Jackson left Boston, and was subsequently adjudged a bankrupt. William Carpenter also failed and was adjudged a bankrupt. There are only nominal assets in his estate; and no dividend has been declared out of it. The plaintiffs proved against William Carpenter all of the claims held by them, including the note for $2625, given in exchange for the second note furnished to Jackson, and Cyrus Carpenter was appointed one of the assignees of his estate.

Shortly before the plaintiffs' second note for $2625 matured, the plaintiffs were notified that the same was held by the defendant, and thereupon wrote to the defendant that it would not be convenient for them to pay the note at maturity, but that they would pay twenty-five per cent in cash and give a note for the remainder. A few days after its maturity, namely, on June 26, 1875, one Bush, the president of the defendant, called at the plaintiffs' place of business and brought the note with him. A settlement was made by the payment of $704.95 in money, and the giving of a new note by the plaintiffs for $1968.75, payable in four months from June 18, 1875. The plaintiff testified that he was familiar with the signature of William Carpenter, but that, in the conversation with the president of the defendant bank, nothing was said about the indorsement, and that he did not in fact examine it. Bush testified that Cyrus Carpenter turned the note over and looked at the indorsements. Bush was not familiar with William Carpenter's signature. Shortly after Bush had left the plaintiffs' counting-room, Cyrus Carpenter handed the note to his son, one of the plaintiffs and bookkeeper of the firm. The note purported to be indorsed by William Carpenter and by Abraham Jackson. The son immediately expressed the opinion that the pretended signature of William Carpenter was a forgery. The note was soon afterwards shown to William Carpenter, who pronounced his signature a forgery. The plaintiffs thereupon notified the defendant that the supposed indorsement of William Carpenter was forged, that they would require the defendant to return the money paid, and they should not pay the note for $1968.75.

The plaintiffs subsequently filed a petition in bankruptcy, and effected a composition with their creditors for ten cents on the dollar, in accordance with the provisions of the bankrupt law.

There was evidence tending to prove that the indorsement of William Carpenter to the note aforesaid was forged, that he did not know of the

making of the note; and it appeared that the note was placed or passed about the time of its date by Jackson through a broker to the defendant, who discounted and took and paid the amount of the same in good faith, and there was evidence tending to prove that the proceeds of the note were used by Jackson for his own purposes.

Upon this evidence the judge ruled that the action could not be maintained, and directed a verdict for the defendant. If there was any evidence upon which the action could be maintained, the verdict was to be set aside and the case stand for trial.

R. M. Morse Jr. (*C. P. Greenough* with him) for the plaintiffs.

A. A. Ranney for the defendant, cited Farmer *v.* Arundel;[1] Moore *v.* Eddowes;[2] Norton *v.* Marden.[3]

Lord, J. It is to be assumed, in testing the accuracy of the ruling of the learned judge who presided at the trial, that every fact upon which there was evidence for the jury was found most favorably for the plaintiffs.

It is then to be taken that the signature of William Carpenter was forged; that Jackson misappropriated the funds which he had procured upon the forged indorsement; that William Carpenter never had knowledge that such note had been taken in his name by Jackson, and that the note was originally obtained from the plaintiffs by fraud. It must also be taken to be settled that Jackson had no authority to indorse the name of William Carpenter, nor to assign the note for his own benefit; and that the acts done in the premises by Jackson were done in fraud of the rights of William Carpenter and of the plaintiffs. The question then is: Could the bank acquire any title, legal or equitable, to the note thus originally obtained by fraud, and passed to it not only in fraud of the rights of the maker, but by forgery as one of the means of accomplishing the fraud? Certainly it could not.

The question sometimes discussed, whether an acceptor is bound to know the genuineness of the signature of the drawer, does not arise. Nor is it necessary to consider to what extent the rule that every party to mercantile paper warrants the genuineness of every signature preceding his, is to be applied. The plaintiffs were the makers of the note. It was payable only to the order of William Carpenter. Such order was never given. The plaintiffs therefore had never promised to pay the note to the bank. The bank could not have collected the note of the plaintiffs. When the plaintiffs paid the note to the bank, they paid it under the mistaken belief that the bank was the legal owner of the note, and had the right to collect it. It was, however, immediately discovered that the bank had no such right, and notice was at once given to it that the money thus paid by mistake would be reclaimed. It is common learning that ordinarily money paid by mistake to a person not authorized to receive it may be recovered back by the person paying. The cases in which it has been held that money thus

[1] 2 Bl. R. 824. [2] 2 A. & E. 133 *n.* [3] 15 Me. 45.

paid cannot be recovered back have been exceptions to the rule, by reason of peculiar circumstances attending the particular payments.

The case most resembling this, but less favorable to the plaintiffs, is that of Canal Bank *v.* Bank of Albany.[1] That was the case of the acceptor of a draft in favor of one Bentley; the name of Bentley was forged; subsequently the draft was indorsed by several innocent parties; and it came into the hands of the defendant bank for collection on account of another bank. Upon notice, the acceptor paid the draft to the defendant bank, which did not disclose the fact of its agency, which bank paid the amount over to its principal. Several weeks afterwards it was discovered that the name of Bentley was forged, too late to give notice to the indorsers, and after payment to the principal. It was held that the money could be recovered back of the defendant, notwithstanding the defendant had paid it over without notice, and notwithstanding that the indorsers could not be notified of the refusal or the failure of the acceptor to pay. It was said that, inasmuch as each subsequent indorser had paid for the draft under a mistake of fact, supposing it to be a genuine instead of a forged indorsement, he could recover the amount which he paid of the person to whom he paid it. It is not necessary for us to consider whether or not the rule thus laid down is sound, for the reasons, first, that no such question arises in the present aspect of the case, nor can it arise in this case, inasmuch as Abraham Jackson, the assumed forger of the indorsement, was the only indorser of the note against whom any claim could arise as indorser; and neither law nor equity could require that notice should be given to Jackson, to fix his liability upon a note which he had passed by his own forgery of an indorsement.

Inasmuch, therefore, as in this case there are none of the elements which have been held to bring a case within the exceptions to the general rule, an examination of the exceptions to the rule is unnecessary. This is simply the payment of a note to a party who has no legal and no equitable interest in the promise of the maker, whatever its rights may be as against Jackson, whose name is upon the same paper. The money having been paid by mistake to a person who had no right to demand it, the case is within the general rule, and the party paying may recover back the amount thus paid. This principle has been recognized in various decisions in this Commonwealth. See Merriam *v.* Wolcott;[2] Merchants' National Bank *v.* National Eagle Bank;[3] Boylston National Bank *v.* Richardson;[4] National Bank of North America *v.* Bangs.[5]

Verdict set aside.

[1] 1 Hill, 287.
[2] 3 Allen, 258.
[3] 101 Mass. 281.
[4] 101 Mass. 287.
[5] 106 Mass. 441.

THOMAS J. WELCH *v.* WILLIAM H. GOODWIN.

In the Supreme Judicial Court of Massachusetts, July 3, 1877.

[*Reported in* 123 *Massachusetts Reports*, 71.]

Contract for money had and received. The declaration also alleged that the defendant was the holder of a certain promissory note purporting to be signed by the plaintiff, and payable to the order of and indorsed by Abraham Jackson, for the sum of $2000; that on July 8, 1875, the plaintiff, supposing the note to be genuine, and the signature of the maker upon it to be his own signature, at the request of the defendant and before the note was due, paid the defendant the full amount of the note, with interest thereon, namely, the sum of $2053; that the note was not genuine; that he never signed or executed it; that his name signed thereto was a forgery, and not made by him or with his knowledge or consent; that, immediately upon his discovery of this fact, he notified the defendant and demanded repayment of the sum so paid. Annexed to the declaration was a copy of the note, as follows: —

$2000.00. Charlestown, March 1, 1873.

For value received, I, Thomas J. Welch, promise to pay to Abraham Jackson or order the sum of two thousand dollars in three years from this date, with interest to be paid semi-annually at the rate of eight per centum per annum.

Thomas J. Welch.

In presence of
Wm. T. Canavan.
Indorsed, Abraham Jackson.

Trial in the Superior Court, before Gardner, J., who reported the case for the determination of this court in substance as follows: —

It appeared that in March, 1873, the plaintiff borrowed of Abraham Jackson the sum of $2000, and gave therefor to Jackson his note, a copy of which is annexed to the declaration, and, as security therefor, a mortgage upon a certain parcel of real estate owned by him, which mortgage was recorded on April 1, 1873; that prior to February, 1875, Jackson was largely indebted to the Eliot National Bank, of Boston, of which the defendant then was and ever since has been the president; that, among other indebtedness, the bank held a note for $4500 of Jackson's and of the American Steam Safe Company, and others, upon which note the loan of $4500 had been made by the bank; that this note became due in February, 1875, was unpaid, and was protested for non-payment; that shortly after, the bank received from Jackson, in payment of the past-due time

note, a new note (the old note being retained by the bank), with Jackson's name alone on it, for the sum of $4500 on demand made by Jackson, payable to the bank, and, together therewith, certain collateral security, — the demand note, with the collateral, being received as a substitute for the old security; that the collateral consisted of three mortgage notes, together with the assignments of the mortgages, one of which notes and assignments was a note, a copy of which is annexed to the declaration, and an assignment of the mortgage of the plaintiff to Jackson; that the assignment of the mortgage was not made upon the original mortgage deed, but was a separate instrument, and was from Jackson to the defendant by name "as trustee," but the nature of the trust was not set forth in the instrument; that this assignment was executed on February 23, 1875, and recorded at the Registry of Deeds in Middlesex, Southern district, on February 23, 1875, and in the Suffolk Registry of Deeds, on March 10, 1875; and that, at the time that these notes and assignments were received by the bank, it was agreed between the bank and Jackson, that, in case the bank should receive upon the collateral more than sufficient to satisfy the $4500 demand note, the balance should be retained and credited towards satisfying whatever other indebtedness there might remain from Jackson to the bank.

It also appeared that the bank realized upon the whole of the collateral security, and obtained therefrom, including the $2053 hereafter mentioned, paid by the plaintiff, more than enough to pay the $4500 demand note, with interest, and that the balance was duly credited towards satisfying the remaining indebtedness of Jackson; that Jackson was still a large debtor to the bank; and that, in case the bank should repay the $2053 paid by the plaintiff, the amount realized from the whole of the collateral would not be enough to satisfy and pay the $4500 demand note. This evidence was objected to as immaterial; but by agreement of counsel it was admitted *de bene*, and the judge reserved the matters of law arising thereon for the determination of this court. It was not admitted as bearing upon any of the questions submitted to the jury.

It also appeared, and was uncontested, that a petition in bankruptcy was filed against Jackson on May 28, 1875, and that he was duly adjudicated a bankrupt thereon.

The plaintiff proved that prior to February, 1875, and on March 18, 1873, Jackson made an assignment of the plaintiff's mortgage to the Franklin Insurance Company, and therewith a note, a copy of which is annexed to the declaration; that this assignment was not upon the original mortgage deed, but was a separate instrument, and that said assignment was not recorded until April 23, 1875; that, in the spring of 1875, hearing that Jackson had committed forgeries, the plaintiff desired to know what had become of his mortgage note; that he thereupon went to the registry of deeds at Cambridge, and got the register to look at the records, and was told by him that the mortgage had been assigned to William H. Goodwin;

and he testified that nothing was said to him by the register about the word "trustee;" that he thereupon called upon the defendant at the bank, and had several interviews at the bank with him, which resulted on July 8, 1875, which was more than seven months before his note became due, in his paying to Goodwin the sum of $2053, being the amount of his mortgage note, and the interest due thereon and unpaid; that the paper purporting to be his mortgage note, being the one received from Jackson by the bank, was thereupon surrendered up to him, and that thereupon a friend who was with him, and in his presence and in the presence of the president and cashier of the bank, scratched with pen and ink the name "Thomas J. Welch" signed to the note; that he directly went with the defendant to the registry of deeds, where the defendant, by a deed as trustee, released to him the mortgage made to Jackson, and that the release was thereupon immediately recorded at the said registry; that he thereafter, and on the same day, in conversation with friends and at their suggestion, tore the name of "Thomas J. Welch" off from the note, and destroyed that portion of the paper upon which it was written; that about July 26, 1875, he was led to suspect that the Franklin Insurance Company held a note purporting to be his mortgage note, and an assignment of the mortgage; that he called at the office of the company, and was there shown a note passed by Jackson to that company, which he then and there recognized to be the genuine mortgage note, and was also shown an assignment of the mortgage; that he never made but one note in his life; that he immediately consulted counsel, who, on July 28, 1875, gave to the defendant the notice, a copy of which is printed in the margin;[1] that, at the time he paid the $2053, he supposed and understood the note he then took up to be his genuine note, and always so supposed until he saw the note held by the Franklin Insurance Company; that the defendant never notified him that he was acting in the transaction other than personally, and that he did not know that it was a bank transaction; and that, after his first call upon the defendant, he received two letters, which he had since lost, requesting him to call again; that he could not swear certainly, but was very positive that these letters were signed in the defendant's name, and that there was nothing contained therein indicative of the matter being an affair of the bank. A witness called by the plaintiff, who came with him to the bank when the money was paid, testified that it was paid into the defendant's hands.

[1] BOSTON, July 28, 1875.

WM. H. GOODWIN, ESQ.

DEAR SIR, — We are instructed by Mr. Thomas J. Welch to inform you that he finds his signature on the note for $2000, dated March 12, 1873, and paid to you July 8, to have been forged, and that the genuine mortgage note is held by the Franklin Insurance Company. Accordingly he requests you to repay the amount of his payment, viz., $2053.

Respectfully yours,

MORSE, STONE & GREENOUGH.

The defendant introduced evidence that the $2053 was paid by the plaintiff into the hands of the cashier of the bank, and not into his hands; that the defendant never wrote to the plaintiff, but that the two letters received by the plaintiff were written upon paper upon the top of which was printed "Eliot National Bank. W. H. Goodwin, president; R. B. Conant, cashier;" and that both letters were written by the cashier, signed by him in his name, with the word "cashier" added, and that they referred to the matter as an affair of the bank, and stated that the bank held the assignment. The defendant proved that the money paid by the plaintiff was immediately credited to Jackson's account on the books of the bank, and was immediately placed with the other funds of the bank; that the note paid by the plaintiff was always kept by the bank together with its other securities, and was in charge of the cashier; that when the plaintiff paid the money, the defendant had no knowledge or suspicion of this note being a forgery, and no knowledge or suspicion of the existence of another note or of another assignment of the mortgage, and never had any knowledge or suspicion of either of these things. The defendant also testified that he did not recollect distinctly, but thought that at one of the interviews with the plaintiff, before the money was paid him, he exhibited to him the assignment from Jackson to himself as "trustee," which, however, the plaintiff denied, and said that he did not suppose that he had personally anything to do with the matter, but considered it a bank transaction, and that in all that he did he was acting in his capacity as president of the bank; that neither of the two letters received by the plaintiff mentioned the fact that the bank held the assignment, and that his object in the beginning in having the plaintiff call was to pay the interest due on the note.

The plaintiff introduced evidence tending to show that the note paid by him, and purporting to be witnessed by a clerk of Jackson, was a forgery, and that it was forged by Jackson; and that the note held by the Franklin Insurance Company was a genuine note. There was no other evidence in the case which was material. At the conclusion of the evidence, the defendant asked the judge to rule that the plaintiff could not maintain this action. The defendant contended that the action, if maintainable against anybody, should have been brought against the Eliot National Bank; that the action, if otherwise maintainable against the defendant, could not be maintained merely on proof of the note paid by the plaintiff being a forgery, and on proof of the notice of July 28, 1875, and on proof that he gave that notice within a day after going to the Franklin Insurance Company's office; that, as it appeared that the transaction of the bank with Jackson was *bona fide*, Jackson had thus parted with a title good as to the Franklin Insurance Company and the plaintiff, and that thus the bank was damaged by the release to the plaintiff of this mortgage; and that the notice of July 28, 1875, was not seasonable.

The judge declined so to rule, but stated that all the questions of law

arising in the case should be reported to this court, and fully instructed the jury that if the plaintiff proved the facts stated in his declaration, he was entitled to recover; that the first question was whether the note was a forged note; that if the jury found it to be a forged note, the plaintiff was entitled to recover, provided that he was not informed of the forgery of the note until the day or day before he went to counsel, and that in such case the notice of July 28, 1875, would be seasonable notice, and provided that the defendant did not disclose to him the fact that he was not acting as principal in the transaction, and the plaintiff did not know at the time of the payment of the money to the defendant that the defendant was acting for the bank.

The jury returned a verdict for the plaintiff for $2053; and the judge reported the case for the determination of this court.

If the court should find upon this report that the action was maintainable, if at all, only against the bank, or that the notice was not seasonable so as to entitle the plaintiff to recover, or that the plaintiff could not, under the circumstances herein stated, maintain his action on proof of the note being a forgery and the note held by the Franklin Insurance Company genuine, and proof that the defendant did not disclose to the plaintiff the fact that he was acting as principal in the transaction, judgment was to be entered for the defendant; and in case the court should not so find in either particular as matter of law, but should find that the instructions to the jury were not conformable to the requirements of the case, the verdict was to be set aside and a new trial ordered.

R. R. Bishop and *F. Goodwin* for the defendant.

R. M. Morse, Jr., and *C. P. Greenough* for the plaintiff.

Lord, J. This case differs from that of Carpenter *v.* Northborough National Bank,[1] in two particulars only. The payment was received by the defendant in this case as the agent of another party. The instructions of the presiding judge on that subject were correct. One who acts as the agent of an undisclosed principal may be treated as principal by the party with whom he deals.

The other particular, in which the case differs from that of Carpenter *v.* Northborough National Bank, is that the forgery, by means of which Jackson accomplished the fraud, was that of the name of the plaintiff himself; and the only question is, whether that fact of itself is an absolute bar to the right of the plaintiff to recover. We do not understand that any other question than this was presented to the mind of the judge who presided at the trial. If any other questions were presented, it is to be presumed that proper instructions were given in reference thereto, and that the jury were required to make the proper distinction and discrimination between the payment upon a note, the forged signature to which was that of the payer, and not that of another party to the contract.

[1] 123 Mass. 66.

It may well be held that a banking corporation, which issues notes as currency, upon such plates and with such securities as it deems sufficient, may be, from reasons of public policy, estopped to deny the genuineness of notes which it has redeemed as its own, while such considerations would have no bearing upon the question whether an individual should be permitted to show that a signature which he had treated as his own was, in fact, a forgery. Nor is it necessary in this case to go so far as to say, as was held by a majority of the court in National Bank of North America *v.* Bangs,[1] that a bank may recover money paid upon the forged check of one of its depositors. In both those classes of cases, entirely different considerations may properly enter.

The question which we are called upon to decide is, whether, under any circumstances, a party may recover back money paid upon a security bearing a forged signature of himself, supposing it, at the time of payment, to be his own genuine signature. We can have no doubt that he may. This is entirely clear in case he was induced to make the payment by fraud or misrepresentation. Nor is it necessary that fraud or misrepresentation should exist. An innocent mistake, whether arising from natural or temporary infirmity or otherwise, made without fault upon his part, entitles him to the same relief. How far this right would be affected by neglect upon his part to give prompt notice of the mistake, or by any change affecting the situation or rights of the person to whom the payment is made, we are not called upon to consider. Here notice was given immediately upon discovering the forgery. Whatever securities were given up by the defendant, in consideration of the receipt of the forged note, had been given up before the payment was made. The discharge of the mortgage by Goodwin was the release of no substantial right. If Goodwin received any title to the mortgage or mortgaged premises by reason of the assignment to him, he received it in trust for another, and in no event for his own benefit. His discharge of it was therefore no injury in law to him. By the facts as they appear in the report, his discharge of the mortgage effected nothing except what by law or in equity he would be compelled to do. There is no reason, therefore, why the plaintiff should not recover; and there must be

Judgment on the verdict.[2]

[1] 106 Mass. 441.

[2] Lewis *v.* White's Bank of Buffalo, 27 Hun, 396, *contra*. *Conf.* Bank of the United States *v.* Bank of Georgia, 10 Wheat. 333; Cook *et al. v.* United States, 91 U. S. 389–396, 7. — Ed.

THE CORN EXCHANGE BANK, Respondent, *v.* THE NASSAU BANK, Appellant.

In the Court of Appeals of New York, January 16, 1883.

[*Reported in* 91 *New York Reports*, 74.]

Appeal from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made October 28, 1881, which affirmed a judgment in favor of plaintiff, entered upon a verdict.

It appears from the complaint that on the 9th of November, 1874, Messrs. Kunhardt & Co. were depositors with the plaintiff, and on that day made their check upon it, payable to the order of William Ives and John Waters, for the sum of $19,000. On the next day it was presented, and then, purporting to be indorsed by the payees, was paid to the defendant and charged to the drawer's account. On the 23d of March, 1876, Kunhardt & Co. notified the plaintiff that the indorsement was forged, and commenced suit for the recovery of the moneys withheld from them on account of said check, and obtained judgment therefor, with costs. Notice of this suit was at its commencement given to the defendant, and after payment of the judgment the plaintiff demanded repayment of the amount so paid, and offered to return the check to it; being refused, it brought this action. Issue was taken by answer on the question of forgery, and it also set up that the check was received by the defendant from one B., its depositor, in the regular course of business, for collection, and after collection credited to him and so became subject to his check; that his account continued and was good for an amount exceeding the check during the greater portion of the time from its date up to and including March, 1876; that it was retained by the plaintiff until December 3, 1874, when it returned it to Kunhardt & Co.; that no steps were in the mean time taken by it to ascertain the genuineness of the indorsement, nor by Kunhardt & Co., until March 23, 1876; that the defendant's depositor, B. became insolvent, and by reason of the omission of the plaintiff and Kunhardt & Co. to discover the forgery and notify the defendant, its position had been altered to its injury. Upon the trial it was conceded that the signature of the payees of the check was forged, and it was proven that neither the plaintiff nor Kunhardt & Co. took any measures to ascertain its genuineness until the time above mentioned. There was also evidence from which it was apparent that if it had been otherwise the forgery would have been discovered and the defendant, if notified thereof, might have protected itself from loss by calling upon its depositor, B. Various exceptions were taken during the trial, and at its close the defendant asked to go to the jury; first, upon the question "whether the defendant has not shown that it was

injured to the full extent of the $19,000 and interest, or to some part thereof, by the plaintiff's negligence or *laches* in failing to give notice of the alleged mistake;" second, whether it has not proved a loss suffered by it in consequence of the mistake committed by the plaintiff, to the full extent of the check and interest; third, whether, in consequence of the recognition by the plaintiff of the check in question, the defendant did not pay out to its depositor, B., the moneys held on deposit for him on that and subsequent days, or some part thereof. This was denied. Thereupon the court directed a verdict for the plaintiff, for $27,553.43, made up, first, of the amount of the judgment recovered against the plaintiff by Kunhardt & Co.; second, of plaintiff's expenses in defending that action; third, interest on the judgment. To the allowance of each item the defendant excepted. After verdict, in pursuance of this direction, the defendant moved upon the minutes for a new trial. It was denied. An appeal was taken from the judgment and the order denying a new trial, to the General Term, where both were affirmed, and from its decision the defendant appeals to this court.

Joseph H. Choate for appellant.

John M. Bowers for respondent.

DANFORTH, J. The general question involved is answered by a series of decisions by this court, in favor of the respondent. There is no imputation on the defendant with regard to the way in which it took the check of Kunhardt & Co., or the use made of it, but the plaintiff was thereby induced to part with its money without consideration, and the defendant, who received it, is bound to make restitution, unless the plaintiff, by some act or omission of its own, has lost the right to demand or sue for it. White *v.* Continental Nat. Bank,[1] and cases there cited by ALLEN, J.[2]

The appellant contends that it was the plaintiff's duty to examine and ascertain the genuineness of the payee's indorsement before paying the check, and that in default of doing so, it is as against the defendant estopped from denying its genuineness; but the authorities are the other way. Canal Bank *v.* Bank of Albany;[3] Whitney *v.* Nat. Bank of Potsdam;[4] Holt *v.* Ross;[5] The Union Nat. Bank of Troy *v.* Sixth Nat. Bank of N. Y.;[6] White *v.* Continental Nat. Bank;[7] Graves *v.* Am. Exch. Bank.[8]

The recovery, however, should have been limited to the amount of money received by the defendant from the plaintiff, with simple interest to the time of the rendition of the verdict. The plaintiff paid the check of Kunhardt & Co. at its own risk and without authority, and could have no defence to their action. Hall *v.* Fuller;[9] Morgan *v.* The Bank of the State of N. Y.[10] There was no privity between Kunhardt & Co. and this defend-

[1] 64 N. Y. 316. [2] 21 Am. Rep. 612. [3] 1 Hill, 287.
[4] 45 N. Y. 303. [5] 54 N. Y. 472. [6] 43 N. Y. 452.
[7] 64 N. Y. 316. [8] 17 N. Y. 205. [9] 5 B. & C. 750.
[10] 11 N. Y. 404.

ant. The money received by it was not their money, and it was not liable to them. Their money was still on deposit with the plaintiff, and the plaintiff owed them for it.

The cases cited by the plaintiff are not analogous. Elwood *v.* Deifendorf[1] and Thompson *v.* Taylor[2] stand upon the technical relation of principal and surety, and even then the right to indemnity was held not to extend to expenses incurred in defending against the just claim of the creditor. In Delaware Bank *v.* Jarvis[3] the defendant was the vendor of the note in question, and had received from the plaintiff the agreed price thereof. The costs in controversy were incurred in an action which failed because the note was void for usury taken by the vendor, and the recovery for costs allowed in that action was upheld upon the ground that the vendor of a chose in action impliedly warrants its soundness and validity, so far at least as he had been connected with its origin. In the other cases cited by the respondent, the plaintiff had become liable to costs in actions in which he had a remedy over against the then defendant, but in none of them did it appear that the action in which the costs were incurred was caused in whole or in part by the wrongful act or omission of duty on the part of the original defendant. No case I think can be found in which the right to costs of defending an action so caused has been upheld, and that is precisely the position of the plaintiff here. It did not buy or propose to buy the check of the defendants; it assumed to pay it as the obligation of Kunhardt & Co., and when informed by them that the condition — indorsement by payee — on which alone they authorized payment, had not been performed, they took the risk of defeat by joining issue with their principals, and withheld their money until it could be determined. It was the business of the plaintiff as between itself and its depositors, to see to it that their money should not be expended except as they directed (Weisser *v.* Denison;[4] Morgan *v.* Bank of State of N. Y.;[5] Graves *v.* Am. Exch. Bank;[6] Welsh *v.* German Am. Bank[7]), and having failed to do so, cannot charge the expense of an action caused by such default upon a third party. The defendant's liability in the present action stands upon a different and entirely distinct ground, — the receipt of money paid under a mistake and without consideration.[8] The same principle forbids rests in the computation of interest upon the amount paid.[9]

All concur, except RAPALLO, J., absent.

Judgment accordingly.

[1] 5 Barb. 398. [2] 72 N. Y. 32. [3] 20 N. Y. 226.
[4] 10 N. Y. 68. [5] 11 N. Y. 404. [6] 17 N. Y. 205.
[7] 73 N. Y. 424.

[8] *Conf.* Star Ins. Co. *v.* New Haunden Bank, 60 N. H. 442. — ED.

[9] A portion of the opinion relating to the admissibility of evidence has been omitted. — ED.

DE HAHN *v.* HARTLEY.

IN THE KING'S BENCH, JUNE 30, 1786.

[*Reported in* 1 *Term Reports*, 343.]

THIS was an action upon promises brought by the plaintiff (an under writer) to recover back the amount of a loss which he had paid upon a policy of insurance.

Plea the general issue.

The cause was tried before BULLER, J., at the sittings after last Easter term at Guildhall, when the jury found a special verdict which stated —

That the defendant, on the 14th June, 1779, at London, gave to one Alexander Anderson, then being an insurance broker, certain instructions in writing to cause an insurance to be made on a certain ship or vessel called the Juno, which were in the words and figures following: "Please get £2000 insured on goods as interest may appear; slaves valued at £30 per head; comwood £40 per ton; ivory £20 per hundred weight; gum copal £5 per pound; at and from Africa to her discharging port or ports in the British West Indies; warranted copper-sheathed, and sailed from Liverpool with 14 six-pounders (exclusive of swivels, &c.), 50 hands or upwards, at 12, not exceeding 15 guineas. Juno — Beaver. S. Hartley & Co., June 14th 1779."

That the said Alexander Anderson, in consequence of the said written instructions from the said defendant on the said 14th June, 1779, at London aforesaid, etc., did cause a certain writing or policy of assurance to be made on the said ship or vessel called the Juno in the words and figures following (reciting the policy); which was upon any kind of goods and merchandises, and also upon the body, tackle, apparel, etc., of and in the ship Juno, at and from Africa to her port or ports of discharge in the British West Indies, at and after the rate of £15 per cent.

The verdict, after reciting two memoranda, which are not material, then proceeded to state, that in the margin of the said policy were written the words and figures following, "Sailed from Liverpool with 14 six-pounders, swivels, small arms, and 50 hands or upwards; copper sheathed."

That on the said 14th June, 1779, and not before, at London aforesaid, etc., the plaintiff underwrote the said policy for the sum of £200, and received a premium af £31 10*s.* 0*d.* as the consideration thereof.

That the said ship or vessel called the Juno, sailed from Liverpool aforesaid, on the 13th October, 1778, having then only 46 hands on board her, and arrived at Beaumaris, in the isle of Anglesea, in six hours after her sailing from Liverpool as aforesaid, with the pilot from Liverpool on board her, who did pilot her to Beaumaris on her said voyage; and that at Beau-

maris aforesaid the said ship or vessel took in six hands more, and then had, and during the said voyage until the capture thereof hereinafter mentioned, continued to have, 52 hands on board her.

That the said ship or vessel in the said voyage from Liverpool aforesaid to Beaumaris aforesaid, until and when she took in the said six additional hands, was equally safe as if she had had 50 hands on board her for that part of the said voyage.

That divers goods, wares, and merchandises of the said defendant of great value, were laden and put on board the said ship or vessel, and remained on board her until and at the time of the capture thereof hereinafter mentioned. And that on the 14th March, 1779, the said ship or vessel, while she remained on the coast of Africa, and before her sailing for her port of discharge in the British West India Islands, was, upon the high seas, with the said goods, wares, and merchandises on board her as aforesaid, met with by certain enemies of our lord the now king, and captured by them, etc., and thereby all the said goods, wares, and merchandises of the said defendant, so laden on board her as aforesaid, were wholly lost to him.

That when the said plaintiff received an account of the said loss of the said ship or vessel, he paid to the said defendant the said sum of £200 so insured by him as aforesaid, not having then had any notice that the said ship or vessel had only 46 hands on board her when she sailed from Liverpool as aforesaid. But whether upon the whole matter, etc.

Law for the plaintiff.

Wood for the defendant.

Lord MANSFIELD, C. J. There is a material distinction between a warranty and a representation. A representation may be equitably and substantially answered; but a warranty must be strictly complied with. Supposing a warranty to sail on the 1st of August, and the ship did not sail till the 2d, the warranty would not be complied with. A warranty in a policy of insurance is a condition or a contingency, and unless that be performed there is no contract. It is perfectly immaterial for what purpose a warranty is introduced; but, being inserted, the contract does not exist unless it be literally complied with. Now in the present case, the condition was the sailing of the ship with a certain number of men; which not being complied with, the policy is void.

ASHHURST, J. The very meaning of a warranty is to preclude all questions whether it has been substantially complied with; it must be literally so.

BULLER, J. It is impossible to divide the words written in the margin in the manner which has been attempted; that that part of it which relates to the copper sheathing should be a warranty, and not the remaining part. But the whole forms one entire contract, and must be complied with throughout.[1] *Judgment for the plaintiff.*

[1] Judgment affirmed in the Exchequer Chamber, 2 T. R. 186. — ED.

MILNES *v.* DUNCAN.

In the King's Bench, Easter Term, 1827.

[*Reported in 6 Barnewall and Cresswell*, 671.]

Assumpsit for money had and received. Plea, general issue. At the trial before Lord Tenterden, C. J., at the Middlesex sittings, after Trinity term, 1826, a verdict was found for the plaintiff for £150, subject to the opinion of this court, on the following case: —

The plaintiff, who was an attorney, resident at Matlock in Derbyshire, was employed by the defendant, an attorney, resident in London, to receive the rents of an estate belonging to the defendant, situate near Matlock. In the course of this employment the plaintiff, on the 11th February, 1826, having previously received from the tenants of the estate more than the sum of £150, he inclosed in a letter of that date, to the defendant, the following Irish bill of exchange for £150, in part liquidation thereof: —

£150. Glen Anne Mills, Nov. 24th, 1825.

Three months after date pay to our order £150 sterling, in London, value received.

Atkinson, Chenmey, and Atkinson.

Mr. Gerald Atkinson, Liverpool.

The bill had several indorsements, but there was nothing in those indorsements to show that the bill had been drawn or indorsed in Ireland. On the 13th of February, the defendant acknowledged the receipt of the bill. The bill became due on the 27th of February, but was not then presented for payment; and upon the 20th of March the defendant wrote the following letter to the plaintiff; "I am sorry to acquaint you that the bill for £150 you sent me for the rent has not been honored. This bill is drawn by or in the name of Atkinson and two other names from some mills, but the writing is so bad, that I cannot make the name or the place out; what am I to do in this?" The plaintiff received this letter on the following day, and on the same day applied to his immediate indorsers, Messrs. Arkwright & Co., bankers at Wirksworth, to take up the bill, which they refused to do, because it had been so long overheld. On the same day the plaintiff wrote to the defendant, and informed him he had received the bill for £150 from his bankers, Arkwright & Co. of Wirksworth, and since the receipt of the defendant's letter had applied to them on the subject of it, and they refused to pay it, on the ground that it had been so long overheld. On the 25th of March the defendant wrote to the plaintiff, and said, it was unnecessary for him (defendant) to enter on the subject of supposed delay, as the bill was an absolute nullity, by being drawn on a stamp of inferior value; and he requested the

plaintiff, with as little delay as possible, to remit him the amount of the rent, in which case he would return the void bill. To this the plaintiff, on the 27th of March, replied, that he had again applied to Arkwright & Co., and they had refused to have anything to do with the bill, because it had been overheld for so long a time, and that he, the plaintiff, had directed his agent, Mr. Forbes, to call upon him, defendant, and confer with him on the subject, and requested him to show Forbes the bill. A clerk, by the direction of Forbes, called on the defendant on the 29th of March, and after inspecting the bill, said it was drawn on a 4*s.* stamp. On the 30th the defendant wrote to the plaintiff and informed him that he declined presenting the illegal bill of exchange to any person for payment, because he might thereby subject himself to a penalty as the other parties on the bill had; and that if his (plaintiff's) bankers still obstinately refused to have anything to do with the illegal bill, he should resort to other means; and as his determination was formed, it would be better to act on it immediately, and therefore desired the plaintiff to inform him in the course of a post or two if he (plaintiff) would instruct Forbes to appear for him. Upon the 3d of April, Forbes's clerk, by the plaintiff's direction, again called upon the defendant, and informed him that he had written to the plaintiff, and expected to receive the amount of the bill in a post or two, until which time he requested no proceedings should be taken; and on the 7th April, the same clerk, by the direction of Forbes, paid the amount of the bill, and at the time of so paying it, a second time saw and inspected the bill, which the defendant delivered up to him, and gave the following receipt: "7th April, 1826, received of James Milnes, Esq., by the payment of Mr. Forbes, his agent, two bank post bills, value £150, for a void bill of exchange sent to me by Mr. Milnes for rent." Up to this period the bill in question had been considered and treated by both parties as an English bill, but it afterwards turned out to be an Irish bill, and impressed with a proper stamp suitable to such bill. Upon the discovery of which, on the 12th of April, the plaintiff presented the bill at Messrs. Williams for payment, which was refused by them. But if it had been presented when it became due, there were at that time assets in their hands, and it would have been paid. The acceptor became bankrupt on the 20th of June, 1826, which was after the present action had been commenced.

Coleridge for the plaintiff.

Comyn for the defendant.

Bayley, J. I am of opinion that the plaintiff is entitled to recover. There is no doubt as to the rule of law applicable to this case. If a party pay money under a mistake of the law he cannot recover it back. But if he pay money under a mistake of the real facts, and no laches are imputable to him (in respect of his omitting to avail himself of the means of knowledge within his power), he may recover back such money. In this case the question is, whether there was, on the part of the plaintiff, at the time

when he made the payment, ignorance of the true state of the facts, or any negligence imputable to him, in not availing himself of the means of knowledge within his power? The bill was remitted to the defendant before it was due. He neglected to present it for payment when due, and held it a month. In consequence of that neglect the bill was not paid. Assuming that there was no defect in the bill which rendered it void, but that it was a valid bill, the negligence of the defendant destroyed all right of the plaintiff to recover against the prior indorsers. The situation of the parties was varied by this negligence of the defendant. On the 20th of March, long after the bill became due, he communicated to the plaintiff that the bill had not been paid. At that time the defendant does not appear to have been aware of any infirmity in the bill. The plaintiff apprised Arkwright & Co. of this, and they refused to pay, on the ground that the bill had been held over. The defendant then, for the first time, insisted that the bill was void, on the ground that it had an improper stamp, and he refused to present for payment what he called the illegal bill. It is quite clear that the defendant at that time thought the bill was improperly stamped. The circumstance of his being misled is very strong evidence to show that the bill itself did not supply to the holder adequate means of knowing whether it was properly stamped or not. Payment of the amount of the bill was made by the plaintiff, under the impression that the bill was void. That may be collected from the receipt, which states the payment to have been made in respect of a void bill of exchange. The defendant accepted the money, on the supposition that the bill was void. It afterwards turned out that the bill was drawn in Ireland, that it had an appropriate stamp, and, consequently, was a valid bill. The money was therefore paid to and received by the defendant, under a mistake as to a particular fact, viz., the place where the bill was drawn. Then are any laches imputable to the plaintiff? If it had appeared on the face of the bill to have been drawn in Ireland, there would perhaps have been laches on his part in making the payment, under an idea that the bill was drawn in England and had an improper stamp, when he might by due inquiry of the prior indorser have learned that the bill was drawn in Ireland and was a valid bill. But neither the date nor the indorsements were calculated to raise in the mind of any person who saw the bill any suspicion that it was drawn in Ireland. All the circumstances were as much calculated to give knowledge to the defendant as to the plaintiff; they did not convey to the defendant or the clerk of Mr. Forbes any knowledge that the bill was drawn in Ireland. We may fairly conclude, therefore, that they did not afford adequate means of knowledge. It seems to me, that the plaintiff, at the time when he made the payment, had no adequate means of knowing that the bill was not a void bill; and that being so, it is quite clear that this money was paid under a mistake of fact, and without any laches on the part of the plaintiff, and for these reasons I think he is entitled to recover it back.

HOLROYD, J. I am of the same opinion. In the course of the argument I have entertained some doubts, on the ground that the payment was made and submitted to as matter of right after inspection of the bill. If the money had been paid after proceedings had actually commenced, I should have been of opinion that, inasmuch as there was no fraud in the defendant, it could not be recovered back. The defendant puts his right to have the amount paid, on the ground that the bill was void on account of its being on a wrong stamp. That was a mistake of the fact, not of the law, as it would have been if the bill had been drawn in England upon a proper stamp. It afterwards turned out that the bill was drawn in Ireland, and that the stamp affixed to it was the right one. Then as the plaintiff paid the money under the impression that the bill was drawn in England, and therefore on an improper stamp, it was paid under a mistake of a fact, and I incline to think, that, according to the authorities, he may recover it back.

LITTLEDALE, J. The original fault was with the defendant, for he neglected to present the bill for payment when it became due. According to general principles, therefore, the loss ought to fall upon him. The defendant, finding that the indorser refused to pay it, represented to the plaintiff that it was a void bill in consequence of its not having a proper stamp, and threatened to sue him. The plaintiff, believing that representation to be true, consented to pay the money, but it was stated in the receipt that he paid it in respect of a void bill. Whether it was valid or not depended on a fact of which the plaintiff was at that time ignorant, viz., whether it was drawn in England or Ireland. It is said that he had means of knowing that, for he might have inquired of the prior indorser; but there being nothing on the face of the bill to lead him to suppose that it was drawn in Ireland, he was not bound to make any inquiry, and I am of opinion that he is entitled to recover this money, on the ground that it was paid in ignorance of the fact.

Postea to the plaintiff.

MILLS *v.* THE GUARDIANS OF THE POOR OF THE ALDERBURY UNION.

IN THE EXCHEQUER, FEBRUARY 13, 1849.

[*Reported in* 3 *Exchequer Reports*, 590.]

ASSUMPSIT for money paid. — Plea, *non assumpsit.*

At the trial, before WILLIAMS, J., at the Wilts Summer Assizes, 1848, it appeared that the action was brought to recover the sum of £154 12*s.* 6*d.*, which the plaintiff had paid to the defendants under the following circumstances: — In 1844 the plaintiff became surety for William Bird Brodie the treasurer to the Alderbury Union, by entering into a bond jointly and

severally with Thomas King and William Bird Brodie. The condition of the bond was as follows: — "That the above-named treasurer shall from time to time, and at all times during his continuance in the said office, diligently and faithfully discharge the duties thereof, by receiving all monies tendered to be paid to the board of guardians, and placing the same to their credit, by paying out of the monies in his hands of the guardians all orders on him drawn on their behalf, and duly signed and countersigned, etc.; and shall faithfully discharge all the trusts to be reposed in him in virtue of the said office, and on resigning or being removed from the said office, etc., shall account for and pay over to the said guardians all books and papers, balances, monies, matters, and things belonging, due, or relating to the said Union, etc., which shall be in his custody, possession, or power, in virtue of the said office or otherwise howsoever; and in the event of the death, bankruptcy, or insolvency of the said treasurer during his continuance in the said office, his executors, administrators, or assignees, as the case may be, or his above-named co-obligers, or any of them, shall, on a day to be fixed for that purpose, etc., account for, hand over, and pay over to the said guardians all such books and papers, balances, monies, matters and things as aforesaid." At the time the bond was executed, William Bird Brodie was a partner in the firm of William Bird Brodie and Charles George Brodie, bankers at Salisbury, and so continued until a fiat in bankruptcy issued against them in October, 1847. On the 17th of December, 1847, the following letter was written to the plaintiff by the chairman of the board of the guardians of the Alderbury Union: —

BOARD-ROOM, 17th of December, 1847.

SIR, — On behalf of the Board of Guardians of the Alderbury Union, I hereby give you notice that the balance due from Mr. William Bird Brodie, the late treasurer of the Union, amounts to the sum of £154 12*s.* 6*d.*, and you, as one of his sureties, are hereby authorized and requested to pay, or cause the same to be paid, to Messrs. Charles William Everett & William Smith, bankers, Salisbury, the present treasurers of the said Union, on the 31st day of December inst., who are duly authorized to give you a discharge for the amount, on behalf of the said Board of Guardians.

By order of the Board,

E. P. BUCKLEY, Chairman.

The following letters were also proved to have been written to the plaintiff by Mr. Whitmarsh, the clerk to the defendants: —

ALDERBURY UNION, SALISBURY, Jan. 15, 1848.

DEAR SIR, — By direction of the Board of Guardians I have written to the Poor Law Board respecting the propriety of the guardians proving on the estate of Mr. Brodie for the balance due to them, and am now directed by the Board of Guardians to state the Commissioners' answer, which is,

that by the terms of the bond they are entitled to call upon the sureties for immediate payment, and they request that you will pay the balance to the treasurers, Messrs. Everett & Smith, not later than Thursday next.

I am, dear Sir, yours truly,

W. D. WHITMARSH, *Clerk.*

ALDERBURY UNION, SALISBURY, Jan. 24, 1848.

DEAR SIR, — The Board of Guardians were informed of the reason why the balance due from the sureties of Mr. Brodie was not paid, and of your request for a short time longer to make an arrangement with your brother surety, Mr. King; and I am now directed to state, that the Board are unwilling to press the sureties for payment; but at the present time they have no funds in the treasurer's hands, and therefore they must request that the balance be paid on or before Thursday next.

I am, dear Sir, yours very truly,

W. D. WHITMARSH, *Clerk.*

The following memorandum was indorsed upon the bond: —

Feb. 3, 1848.

This bond is given up to Stephen Mills, Esq., one of the within-named sureties, on his payment of £154. 12*s.* 6*d.*, the balance due from the above-named W. B. Brodie, the late treasurer of the Alderbury Union.

The minute books of the defendants were then called for and produced; they contained the following entry: —

"That the sureties of Mr. Brodie had paid the amount due from him, and that the bond had been given up to be cancelled."

It was then objected that this minute proved a joint payment by two sureties, and therefore that King, the co-surety, should have been joined as a plaintiff in the action. The learned judge reserved the point, and evidence was then given to show that William B. Brodie alone had, in fact, never been in exclusive receipt or control of the monies belonging to the defendants, who had always kept an account, like any other customer, with the firm of William B. Brodie & Charles George Brodie; that the printed contribution warrants issued by the defendants directed the overseers of the respective parishes in the Union to pay to Messrs. Brodie & Co., of Salisbury, at their bank, the amount towards the relief of the poor, and for defraying the general expenses of the Union; that the payments were made accordingly, and in like manner; that the cheques drawn by the defendants were addressed "Salisbury Bank," and required "Messrs. W. B. Brodie & C. G. Brodie" to pay, etc.

It was contended, as the plaintiff was not aware of these facts at the time of his making the payment to the defendants, and as he was surety for W. B. Brodie only, that he was not liable to make good a deficiency in

monies paid to W. B. Brodie and C. G. Brodie jointly. The plaintiff had a verdict for £154 12*s.* 6*d.*, leave being reserved to the defendants to move to enter a nonsuit, if the court should think there was no evidence to support the verdict.

A rule was obtained accordingly in the following term, against which cause was now shown by *Crowder* and *Barstow.*

Montague Smith, in support of the rule.

PARKE, B. The rule must be discharged. It was granted on two points: first, whether the action could be brought by the plaintiff alone; secondly, whether the action was maintainable at all. With respect to the first point, I do not see how, under the circumstances, the other surety could have been joined. The plaintiff can only recover what he has paid; and the question is, whether there is evidence that he has paid the whole or a part of the money. As evidence of payment, a letter of the 17th December, 1847, was put in, requiring the plaintiff to pay the balance due from the late treasurer to Messrs. Everett & Smith, bankers, adding, "who are duly authorized to give you a discharge for the amount, on behalf of the board of guardians." Now, if that document meant only that payment to the bankers shall be payment to the board, it does not make the receipt of the bankers the receipt of the board; but if the meaning is, "pay to the bankers, and their receipt shall be our receipt," then there is evidence that the money was paid by the plaintiff. In my opinion, the document must be construed, not merely as meaning that payment to the bankers shall be a payment to the board, but that the receipt of the bankers shall be the receipt of the board; and, consequently, there is evidence that the plaintiff paid the whole money, and therefore is alone entitled to recover it back.

Then comes the question, whether the money has been paid under a mistake as to the facts. I agree that the plaintiff was not, under the terms of the bond, bound to make the payment. The condition might have been broken though no monies were received by Brodie, the treasurer, alone; but we must look to the letter of the defendants, and the ground on which they say that he misapplied the money received by him for the use of the board, and which the plaintiff, as surety, was bound to repay on demand. The language is, "I hereby give you notice that the balance due from Mr. William Bird Brodie, the late treasurer of the Union, amounts to the sum of £152 12*s.* 6*d.*, and you, as one of his sureties, are hereby authorized and requested to pay," etc., that is, that William Bird Brodie has received a sum of money, for which he has not accounted. The plaintiff, on receipt of this letter, believing himself responsible as for monies received by William Bird Brodie, paid the sum demanded. Then, does he show that he was not bound to pay it? He proves that William Bird Brodie individually and personally received none of the money, but that it was paid into the banking firm of Brodie & Co., as by any ordinary customer of the bank. For monies so paid to two or more parties, the surety for one is not

responsible, according to the cases cited of Bellairs *v.* Ebsworth and The London Assurance from Fire *v.* Bold. Those cases show, that if a person is surety for another for the due accounting for monies received by him, the receipt of monies by that person and his partner is not the same as the receipt by him alone, because the surety may be willing to be accountable for one individual, but not for him and his partner; and a payment to one partner is a payment to both. It is said that those cases are distinguishable, because there another agent was appointed; but I do not think that makes any difference; for, though no fresh treasurer could be appointed, the monies were not received by William Bird Brodie alone, but by him and another person in copartnership, whom the guardians chose to treat as joint treasurer of the Union. If they did that without authority, the case is not altered, for the payments were never made to, or under the control of, the duly appointed treasurer. *Prima facie* the receipt of the firm is not the receipt of the treasurer, and the defendants should have gone on to show a constructive payment to the treasurer. If, for instance, William Bird Brodie had said, "Instead of paying the money to me, pay it into the bank," he would have been responsible; or if he had said, "In order to facilitate the account, I will keep the account with my banker in my own name;" — if that had been proved, it might have been said that he was, as treasurer, keeping the account of the Union. Or again, when money was offered to William Bird Brodie at the counter of the bank, he might have said, "Put it to the defendant's account;" though, in that case, if the guardians paid the money to Brodie & Co. as their bankers, the sureties would not have been responsible. Here the defendants drew, in their own names, cheques on the banking firm, treating them as their joint treasurers; and from that it would seem that they agreed to the monies being paid into the bank to their credit, just as any other customer. The payments not having been made to the treasurer, but to the bank, I think the plaintiff has made out a sufficient case that he was not liable to pay; and, consequently, having paid under a mistake as to the facts, he is entitled to recover.

ROLFE, B., and PLATT, B., concurred. *Rule discharged.*

BERNHARD MAYER, RESPONDENT, *v.* THE MAYOR, ALDERMEN, AND COMMONALTY OF THE CITY OF NEW YORK, APPELLANT.

IN THE COURT OF APPEALS OF NEW YORK, DECEMBER 21, 1875.

[*Reported in* 63 *New York Reports*, 455.]

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, affirming a judgment in favor of plaintiff, entered upon a verdict.

This action was brought to recover back money alleged to have been paid to defendant by mistake.

Plaintiff was the owner of lot No. 28, in block 98, fronting on Fifty-first street, in the City of New York. Said lot was assessed for the expense of paving said street. An assessment was also made at the same time upon the adjoining lot, No. 27, which was owned by another person. Plaintiff received a notice issued from the bureau of collection of assessments, directed to the owner of lot 27, stating the making of the assessment thereon, the amount of the same, and that payment of the assessment would be expected by a time specified. Before the time specified plaintiff went to the office of the collector of assessments, presented the notice, paid the assessment therein specified, and took a receipt. On discovering the mistake he presented a claim for repayment of the money to the comptroller, which was not allowed. Defendant's counsel on the trial moved to dismiss the complaint upon the ground that plaintiff could not recover back the money, having paid it voluntarily, and there being no mutual mistake. The motion was denied, and defendant's counsel duly excepted.

D. J. Dean for the appellant.

E. O. Andrews for the respondent.

ANDREWS, J. The general rule that money paid under a mistake of a material fact may be recovered back, although there was negligence on the part of the person making the payment, is subject to the qualification that the payment cannot be recalled when the position of the party receiving it has been changed in consequence of the payment, and it would be inequitable to allow a recovery. The person making the payment must, in that case, bear the loss occasioned by his own negligence. If circumstances exist which take the case out of the general rule, the burden of proving them rests upon the party resisting their payment.

The rule, with its limitation, has come under discussion in several recent cases in this court, and it is unnecessary to restate the grounds upon which it rests.[1]

[1] The learned judge here cited a number of cases. — ED.

The plaintiff, who was the owner of lot 28, in block 98, on Fifty-first street, in the City of New York, was assessed, on the 9th day of January, 1871, for the expense of paving the street, and the assessment was confirmed and became a lien on the premises. He afterwards received a notice, issued from the bureau of collection of assessments, directed to the owner of the adjoining lot (27), stating that an assessment had been made thereon for the improvement, and the amount of the same, and notifying the person to whom it was addressed that payment of the assessment would be expected to be made by a time stated. The plaintiff, supposing that the notice related to an assessment on his lot, afterwards, and before the time named for the payment, went to the office of the collector of assessments and presented the notice and paid the assessment therein mentioned to the proper officer and took his receipt. On subsequently ascertaining the mistake he presented a claim for repayment to the comptroller, and the same not being allowed, brought this action to recover the sum so paid by him.

The circumstances bring the case within the general rule, which authorizes a recovery for money paid by mistake. The plaintiff was not liable to pay the assessment on lot 27, and he paid it in ignorance of fact, supposing that the notice related to the assessment on lot 28, and intending to pay the assessment on his own premises. It does not appear that the assessment on lot 27 was, in fact, cancelled of record, or that the evidence that the lien was discharged, authorized to be given by section 16, chapter 579 of the Laws of 1853, was required or was furnished. If an entry was made of its payment, no reason is shown why, upon discovering the mistake, it might not have been corrected, and the collection enforced against the person liable to pay the assessment, or upon his default, by a sale of the land in respect to which the assessment was made. It does not appear that there has been any change of title to lot 27, and the rights of subsequent purchasers are not in question. The plaintiff did not intend to discharge the liability of the owner of that lot when he paid the assessment, and although the money was received by the city in discharge of the assessment on lot 27, it could, on being apprised of the mistake, have returned the money to the plaintiff, and been restored to its original position. The Mayor *v.* Colgate.[1]

The city received the money upon a lawful demand, but from a person who was not legally liable to pay it, and we do not find that the circumstance that money paid by mistake is received upon a valid claim in favor of the recipient against a third person prevents a recovery back, provided the claim against the party who ought to pay it is not thereby extinguished or its collection prevented.[2]

The claim is made, on behalf of the city, that the money collected on local assessments is not collected for the benefit of the city, or received into

[1] 12 N. Y. 140. [2] 43 N. Y. 452; 14 id. 432.

the treasury for its use; and that the city in making local improvements acts for the benefit and in behalf of the owners of the land on which the assessment is made. The paving of streets, the construction of sewers, and works of like character within the city, are spoken of as local improvements, but they are instituted by the corporation, and are public improvements as strictly as any other improvements undertaken by the corporation. The statute, in view of the special benefits which are supposed to result from them to the owners of lands near which they are made, imposes the expenses incurred in making them in whole, or in part, upon the property within the district specially benefited. But the work is a public work. The city contracts for the performance, and, by chapter 397, Laws of 1852, and subsequent statutes, is authorized to borrow the money upon its bonds to pay in the first instance the expenses incurred in prosecuting it. The city treasury is entitled to ultimate reimbursement from the owners of lands which may be locally assessed, and, upon their default to collect the expenses, by a sale of the land; but it receives the money collected through local assessments in its own right, and not as agent or depositary, either of the land owners or the holders of the bonds.

We are of opinion that no obstacle to the plaintiff's recovery exists, and that the defendant cannot justly claim to retain the money received under the circumstances disclosed.

The judgment of the General Term should be affirmed, with costs.

All concur.

Judgment affirmed.

WILLIAM H. TALBOT AND OTHERS *v.* NATIONAL BANK OF THE COMMONWEALTH.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, JUNE 30, 1880.

[*Reported in* 129 *Massachusetts Reports*, 67.]

CONTRACT for money had and received. Writ dated June 11, 1879. The case was submitted to the Superior Court on agreed facts, in substance as follows: —

On September 15, 1877, the plaintiffs were the owners of a promissory note for $642.79, dated Kalamazoo, Michigan, September 10, 1877, payable five months after date to the order of Patrick Reynolds, signed by John J. Mullen, and indorsed by Reynolds and by the plaintiffs. On the above day, the plaintiffs offered the note, with their indorsement, to the defendant bank, of which they were customers, for discount, in the ordinary course of business; and the same was discounted by the defendant, and the plaintiffs received the amount of the note less the rate of discount agreed on. On the day the note matured, the maker occupied a house in Kalamazoo and

had had a place of business there, but did not have any there on that day. The defendant, before the maturity of the note, sent it to a bank in Kalamazoo for collection, and, not having been paid at maturity, the note was protested by a notary, who stated in his protest that he presented the note at a certain bank and "at the store lately occupied by John J. Mullen, and demanded payment thereof, which was refused;" and that due notice "that such note had been thus presented for payment, and that payment had been thus demanded and refused," and that the holder of the note would look to the indorser for payment, was sent by mail to the indorsers.

The note, after protest, was returned to the defendant, with the protest annexed; and the defendant called upon the plaintiffs as indorsers to pay the same. The plaintiffs, believing that a proper demand had been made on the maker, and that the note had been duly protested, paid the defendant the amount of the note, and took away the note with the protest annexed, the same being given up to them by the defendant simultaneously with the payment of the money. The plaintiffs did not know the contents of the protest, but, relying on the notice of dishonor sent them and the claim of the defendant, believed that the protest was good, and that they were bound to pay the note to the defendant. They then brought suit against the first indorser, Reynolds, at Kalamazoo, and, at the trial of that action, the above facts as to the protest, then first known to the plaintiffs, appearing, the court ruled that the note had not been properly protested, and that a verdict for the defendant would be ordered. Thereupon the plaintiffs became nonsuit; and, after a tender of the note to the defendant, brought this action.

The Superior Court ordered judgment for the plaintiffs for $713.48; and the defendant appealed to this court.

J. R. Bullard for the plaintiffs.

C. H. Drew for the defendant.

Soule, J. When the note matured, the maker occupied a house in Kalamazoo. He had no place of business, and the note did not specify any place of payment. It was payable, therefore, at his house. It was not presented there for payment, nor to the maker elsewhere. The presentment at the place in Kalamazoo which had formerly been occupied as a place of business by the maker, without any inquiry as to his place of residence, was not a good presentment, and did not show such diligent search for the maker, and failure to find him, as would excuse a want of presentment of the note and demand of payment. Garland *v.* Salem Bank;[1] Granite Bank *v.* Ayers;[2] Porter *v.* Judson.[3] The note, therefore, was not dishonored, and the plaintiffs were discharged from all liability as indorsers. They paid it under the supposition that it had been dishonored, and that their liability had been fixed. They had received notice that it had been dis-

[1] 9 Mass. 408. [2] 16 Pick. 392. [3] 1 Gray, 175.

honored, signed by the notary, and forwarded to them by the defendant bank. They had the right to rely on this notice, thus forwarded, as true, and the payment made by them in consequence was a payment made under a mistake of fact on their part, and they are entitled to recover the amount paid in this action. Garland *v.* Salem Bank.[1]

Interest on the amount paid by the plaintiffs is recoverable only as damages for the wrongful detention of the money by the defendant. Nothing in the facts agreed shows that the plaintiffs made any demand for the money before bringing suit. Under these circumstances, interest should be computed from the date of the writ only. Ordway *v.* Colcord.[2]

Judgment for the plaintiffs accordingly.

MALCOLM and Another, Assignees of MAYNE and GRAHAM, Bankrupts, *v.* FULLARTON.

In the King's Bench, November 8, 1788.

[*Reported in* 2 *Term Reports*, 645.]

Upon a rule to show cause why the award which had been made in this cause should not be set aside, it appeared that there had been accounts between the bankrupts and the defendant, and that the latter had paid 1500*l.* after the bankruptcy to the plaintiffs as assignees, which was only a part of the sum they demanded. The present action had been brought to recover a further sum claimed as due from the defendant to the bankrupts' estate; to which the general issue only had been pleaded; and pending the suit, it was agreed to refer all matters in difference between the parties in the cause to the determination of an arbitrator, who, upon examination of all the accounts between the parties, awarded the sum of 700*l.* to be paid by the plaintiffs to the defendant on a particular day.

Bearcroft, *Garrow*, and *Park*, for the plaintiffs.

Erskine and *Adam* for the defendant.

Lord Kenyon, C. J. The first objection which has been raised against this award, namely, that the arbitrator has exceeded his authority, would, if it were well founded, be destructive of it. But that is answered by reading the terms of the reference; by which it appears that "all matters in difference between the parties in the cause" were referred. "The parties in the cause" is merely a description of the persons, and not of the subject matter in dispute. And indeed this is the constant form of these submissions to awards, which are intended to include all matters in dispute between the parties. With respect to the latter objection, that the arbitrator has awarded a particular sum to be paid *in solido* on a certain day, instead of

[1] 9 Mass. 408. [2] 14 Allen, 59.

directing him to go before the commissioners to prove this debt; if this had been a debt due from the bankrupt to the defendant, the objection would have holden; but this debt was not contracted before the bankruptcy, for the defendant inadvertently paid a sum of money to the assignees after the bankruptcy, which it now appears was not due to them. That sum therefore could not be proved under the commission; and the arbitrator could only award that the sum which was overpaid to the assignees should be repaid by them to the defendant *in solido*.

Ashhurst, J. I cannot conceive that any injustice has been done to the parties in this cause. The award recites that there was an account between the parties, consisting of items on both sides, and that a gross sum was paid by the defendant to the assignees. And it now appears that part of that sum was paid on a mistake; therefore that money was received by the assignees in their own wrong; it never constituted a part of the bankrupt's estate. The defendant is of course entitled to receive that sum in gross; and if the arbitrator had awarded otherwise, he would have done great injustice.

Buller, J. The first question which has been made in this case, is of very general importance, because it extends to all references, and must settle the meaning of the terms of a general reference. This question came before the court in the case of Bridgewater *v.* Gandersequi,[1] where the words in the rule of reference were similar to the present. *Erskine* then contended that those words only included the matters in dispute in that cause; and that the arbitrator had exceeded his authority, in taking into consideration any other matters in difference between the parties. *Howarth*, in answer, insisted that the terms of the reference were descriptive of the parties in the cause, and not of the particular cause between the parties; and of that opinion was the court. Here therefore is an express determination on the point. On inquiry I find that the difference in practice, where the parties intend to refer only the cause, or all matters in difference between the parties, consists in transposing the words; in the first instance the words in the rule of reference are, "all matters in difference in this cause between the parties;" and in the latter, "all matters in difference between the parties in this cause;" as in the present case. An argument has been drawn at the bar from the subsequent words, by which it is agreed that the costs should abide the event of the cause; from which it was contended that only the matters in that particular cause were intended to be referred. But I do not think that those words will warrant the conclusion which has been drawn from them; for it is well known that the costs are subject to the will of the parties; and sometimes they are referred in one form, and sometimes in another. The next question is, whether the arbitrator, by his award, has infringed on the policy of the bankrupt laws, and altered the distribution of the bankrupt's effects. I

[1] Tr. 22 Geo. 3, B. R.

am clearly of opinion that this award does not interfere with the bankrupt laws. The sum awarded to be paid by the assignees to the defendant was never paid into the bankrupt's hands; it was part of a sum paid after the bankruptcy, and the defendant could never have proved it under the commission. Then it stands thus: money has been paid into the hands of the plaintiffs which was not due; and only so much of it as was due at the time to be considered as part of the bankrupt's estate. Therefore the arbitrator has done right in awarding the 700*l.* to be paid by the assignees to the defendant. The only point upon which I had any doubt was, whether the defendant were bound by the payment of 1500*l.* which he made to the assignees after they had delivered to him their account, and demanded the balance of it. But I am now convinced that he is not bound by that payment, it having been made by mistake. The only payment by which a party is bound, is that which is made into court under a rule of court; that is a payment on record; and the party can never recover it back again, though it afterwards appear that he paid it wrongfully; but that does not extend to payments between party and party.

GROSE, J., of the same opinion. *Rule discharged.*

IRVING *v.* RICHARDSON.

IN THE KING'S BENCH, APRIL 22, 1831.

[*Reported in* 2 *Barnewall & Adolphus*, 193.]

ASSUMPSIT for money had and received; plea, the general issue. At the trial before Lord TENTERDEN, C. J., at the sittings in London after last Hilary term, the circumstances appeared to be as follows: — The defendant, Richardson, effected a policy of insurance for 2000*l.*, on the ship Swiftsure valued at 3000*l.*, with the Alliance Marine Insurance Company, on behalf of which this action was brought by the plaintiff, as chairman, pursuant to act of parliament. The defendant had previously insured the same vessel, valued at the same amount, with another company for 1700*l.* The ship was lost, and he received the amount of the insurances from both companies, the Alliance not being then aware of the first insurance. It also appeared that the defendant was interested in the Swiftsure as mortgagee for the sum of 900*l.*, and no otherwise. This action was brought by the Alliance Company to recover their proportion of 700*l.*, the excess of the sum received by the defendant on the two policies above 3000*l.*, which they alleged to be an over payment. On behalf of the defendant, evidence was given that the full value of the vessel exceeded the amount insured, and it was contended, that the mortgagee was therefore entitled to retain that amount, though above the valuation in either policy, to which point

Bousfield *v.* Barnes [1] was cited. Lord TENTERDEN, C. J., thought that case not applicable to the present; there the assured sought to recover 600*l.* on a policy upon a ship valued at 6000*l.*, and it was objected that he had already received 6000*l.*, on a policy effected with another office on the same ship valued at 8000*l.*; and it being proved that she was really worth 8000*l.*, Lord ELLENBOROUGH held, that he might recover the 600*l.*; but here the value stated in both policies was the same, viz., 3000*l.*, and the defendant claimed to receive, in the whole, 3700*l.* Lord TENTERDEN, however, left it to the jury to say whether the insurance effected by the defendant was intended to cover the defendant's own interest only as mortgagee, or that of the mortgagor also. In the latter case, if Bousfield *v.* Barnes was applicable, the defendant would have been entitled to a verdict, as the sum received by him would not have exceeded the actual value of the interest protected by the two policies. The jury thought (and there was some evidence to warrant the conclusion) that the defendant only meant to insure his own interest as mortgagee; and on that ground they gave a verdict for the plaintiff for 286*l.*

Campbell for the defendant.

Lord TENTERDEN, C. J., having read over the evidence given at the trial,

LITTLEDALE, J. I am of opinion that this case was properly left to the jury. Before the late registry act [2] the mortgagee of a ship was, in point of law, the owner, and might insure to the full extent of the ship's value to the mortgagor as well as to himself. But by the statute the interests of mortgagor and mortgagee are more distinctly severed than they formerly were. The mortgagor, now, does not cease to be an owner. In order, therefore, that the defendant in this case might not keep possession of a sum exceeding not only the value stated in the policies, but also the amount of his interest, it became necessary to ascertain what it was that he had in reality insured; and with this view it was rightly put to the jury whether, in effecting the policies, he intended to insure the whole interest in the vessel, or merely the amount of his own as mortgagor.

PARKE, J. I am of the same opinion. The mortgagee of a ship, at least since the statute, has a distinct interest from that of the mortgagor, to the extent, *prima facie*, of the value mortgaged. The case, therefore, was rightly left to the jury.

PATTESON, J. The defendant, if he had been suing on one of these policies in respect of his interest as mortgagee, must have averred that he was interested to the amount insured; and could not have recovered the sum here in dispute, if it had been an excess above the value mortgaged. It was, therefore, a proper question for the jury in this case whether he intended to insure that amount only, or the value of the ship to both the parties interested.

Lord TENTERDEN, C. J., concurred. *Rule refused.*

[1] 4 Camph. 228. [2] 6 Geo. 3, c. 110, § 45. — ED.

TOWNSEND *v.* A. S. CROWDY.

IN THE COMMON PLEAS, JUNE 11, 1860.

[*Reported in* 8 *Common Bench Reports, New Series,* 477.]

THIS was an action for money had and received to the plaintiff's use. The defendant pleaded never indebted.

By consent, the following case was stated for the opinion of the court:—

In the year 1851, the defendant and the defendant's brother (William Morse Crowdy), who had for many years previously been in practice in partnership as solicitors at Swindon, in the county of Wilts, took the plaintiff into their firm; the defendant having one-half share in the business, and the plaintiff and the defendant's brother having respectively one-fourth share. In the year 1855, it was agreed that the defendant should retire as from the 31st of December, 1854; and on the 14th of March, 1855, the partnership was dissolved by deed accordingly, and a new one was formed between the plaintiff, the defendant's brother William Morse Crowdy, and William Ormond. It was recited in the said deed (*inter alia*) that the defendant had sold one moiety of his share in the said business to the plaintiff for the sum of £300, payable by six half-yearly instalments of £50 each, on the 30th of June and the 31st of December in each of three years after the 31st of December, 1854, and the further sum of £450, payable at the end of six calendar months next after the expiration of the said period of three years, with interest at £5 per cent from the expiration of the said period of three years; but that the last-mentioned sum was to be subject to a deduction therefrom of the amount (if any) by which the total net profits to accrue during the same period from the two-fourth parts of the said business to which the plaintiff would be entitled during such period should fall short of £1800, which would be the amount of such net profits during the said period of three years, if they continued at their then estimated average of £600 per annum; and that the payment of the said sums should be secured by the covenant of the plaintiff. The deed then contained the following covenant by the plaintiff with the defendant:—

"In pursuance of the said agreement in this respect, and in consideration of the sale and relinquishment by the said Alfred Southby Crowdy to the said James Copleston Townsend of his one-fourth share and interest in the said copartnership business, and of the covenants of the said Alfred Southby Crowdy hereinafter contained, and of all and singular the premises, he the said James Copleston Townsend, for himself, his heirs, executors, administrators, and assigns, doth hereby covenant with the said A. S. Crowdy, his executors, etc., in manner following, that is to say, that he the said J. C.

Townsend, his heirs, etc., shall and will pay to the said A. S. Crowdy, his executors, etc., the sum of £300 by instalments, namely, the sum of £50 on the 30th of June, 1855, the further sum of £50 on the 31st of December, 1855, the further sum of £50 on the 30th of June, 1856, the further sum of £50 on the 31st of December, 1856, the further sum of £50 on the 30th of June, 1857, and the further sum of £50 on the 31st of December, 1857, and, in case all or any or either of the said several sums shall not be paid on the several days on which the same are respectively hereby made payable as aforesaid, shall and will pay to the said A. S. Crowdy, his executors, etc., interest for such sums or sum, or any part thereof, so having become due and remaining unpaid, after the rate of £5 for every £100 by the year, to be computed from the day or respective days on which such sum or sums so in arrear is or are hereby made payable up to the day on which the same shall be paid; And also shall and will, on the 30th of June, 1858, pay to the said A. S. Crowdy, his executors, etc., the further sum of £450, with interest thereon at the rate aforesaid, to be computed from the 31st of December, 1857: Provided nevertheless, and it is hereby agreed and declared between and by the said A. S. Crowdy and J. C. Townsend, that if one moiety of the whole of the net profits of the said partnership business of Crowdy, Townsend & Ormond for the period of three years from the 1st of January, 1855, to the 31st of December, 1857, shall not amount in the whole to the sum of £1800, then and in such case the said J. C. Townsend, his heirs, etc., shall be entitled to deduct from the said sum of £450 hereinbefore covenanted to be paid by him on the 30th of June, 1858, such a sum as shall be equal to the difference between £1800 and the actual amount of one moiety of the whole of such net profits as aforesaid for the said period of three years, and the balance only of the said sum of £450 after such deduction as aforesaid shall be payable by the said J. C. Townsend on the said 30th of June, 1858, with interest for such balance after the rate of £5 per cent per annum from the said 31st of December, 1857, in lieu of the full sum of £450 and interest for the same; and if the said difference between the sum of £1800 and the actual amount of one moiety of the whole of such net profits as aforesaid for the period of three years shall amount to or exceed the sum of £450, then and in such case no part of the said sum of £450 hereinbefore covenanted to be paid by the said J. C. Townsend, his heirs, etc., on the 30th of June, 1858, shall be payable."

And after some other covenants not affecting the question, the parties mutually covenanted (*inter alia*) as follows: —

"And further, that up to and on the 31st of December, 1858, the said A. S. Crowdy, his executors, etc., or any person or persons on his and their behalf, not being a solicitor or attorney practising within twenty miles of Swindon, shall be entitled at all reasonable hours of the day to have access to all or any of the books of account and other books and documents of or

in any wise relating to the business of the said late firm of Crowdys & Townsend, and the firm of Crowdy, Townsend & Ormond, or either of them, and to examine and make copies of or extracts from the same or any of them; and also to have the said books and documents, or any of them, produced and shown forth at such time or times and place or places, and to such extent, as may be reasonably required for the settlement of any question arising out of or relating to any matter or thing herein contained: but, nevertheless, the said A. S. Crowdy, his executors, etc., in exercising any such rights, shall interfere as little as may be with the user of such books and documents in the business of the firm of Crowdy, Townsend & Ormond."

The half-yearly instalments of £50 each were duly paid; and, on the 30th of June, 1858, without any previous application or communication from the defendant, the plaintiff paid £460 18*s.* 6*d.* to the defendant through the bankers, such sum being the remaining sum of £450 with the half-year's interest due thereon. On the day before, viz., on the 29th of June, being the day on which the plaintiff remitted the £460 18*s.* 6*d.* from the country, he wrote to his agent in London, who is the defendant's nephew, as follows: —

SWINDON, 29th of June, 1858.

DEAR SIR, — I have this day paid into your uncle's account, through Robarts & Co., the sum of £460 18*s.* 6*d.*, being the balance due for the purchase of his share of the partnership, with interest thereon (less income-tax) to 30th inst. I believe the deed of dissolution of partnership under which the moneys were payable was deposited with you in London, as well as the new deed of partnership; and, if so, I shall be obliged by your procuring a receipt to be endorsed on the deed for all moneys due from me, and signed by your uncle.

J. COPLESTON TOWNSEND.

JAS. CROWDY, ESQ.

And on Mr. James Crowdy having replied that the deed had not been deposited with him, the plaintiff wrote to him again as follows: —

SWINDON, 8th of July, 1858.

DEAR SIR, — There was a deed of even date with our present deed of partnership, betwixt Mr. W. M. Crowdy, Mr. A. S. Crowdy, and myself, under which it was covenanted by me to pay Mr. A. S. Crowdy £750 by instalments as therein mentioned, with interest on the last instalment, £450, from 1st of January to 30th of June, the time when it became due. This principal and interest I have paid; and, as I fancied you had this deed, as well as the partnership, I wrote to you on the subject. As it appears it is not in your hands, it may be in Mr. A. S. Crowdy's, or at any rate he well knows who has it; and perhaps you will be good enough to ascertain where it is, and suggest that the deed be either given up to me,

the money due thereunder having been all paid, or that a receipt be endorsed thereon, and the deeds left in your custody; as I should wish, that, in the event of the decease either of myself or Mr. A. S. Crowdy, some evidence of payment should be extant.

J. COPLESTON TOWNSEND.

JAMES CROWDY, ESQ.

This letter Mr. James Crowdy forwarded to the defendant, inquiring what answer he should give to it; whereupon the defendant saw Mr. Matthews, the gentleman who held the deed between the parties, and asked him to look it out, that he might endorse on it a receipt, which he prepared as follows:—

1st of July, 1858. I acknowledge that I have received of Mr. J. Townsend the within-mentioned sum of £750 by instalments as within provided, and also all interest due to me thereon.

ALFRED S. CROWDY.

Mr. Matthews was going to London when the defendant spoke to him; but he promised to look out the deed on his return. The defendant then wrote to his nephew, who replied to the plaintiff as follows, enclosing a copy of the proposed receipt, as above:—

LONDON, June 14th, 1858.

DEAR SIR, — I find by a letter received to-day from Mr. A. S. Crowdy, in reply to mine forwarding him yours of the 8th inst., that the deed under which the £750 was payable by you is in the hands of Mr. John Matthews, who is now from home; but so soon as he returns Mr. A. S. Crowdy will endorse upon it a receipt in the form enclosed.

Mr. A. S. Crowdy asks me in the same letter to inquire as to debts due to the old firm, for the collection of which he believes that the above-mentioned deed provides. He would be glad to have in due course an account of how far these are collected.

JAMES CROWDY.

J. C. TOWNSEND, ESQ.

To this letter, the plaintiff replied as follows:—

SWINDON, 15th July, 1858.

DEAR SIR, — I shall be quite satisfied with the proposed receipt when endorsed on the deed of dissolution. With reference to the debts due to the old firm, I have from time to time given Mr. W. M. Crowdy an account of all moneys received and paid by me on behalf of the firm up to the present time; and I understand he is preparing a similar account.

JAS. C. TOWNSEND.

JAMES CROWDY, ESQ.

Within a few days afterwards, Mr. Matthews returned home, and produced the deed, when the defendant endorsed on it and signed the receipt in the form above stated accordingly.

The defendant placed the £460 18*s.* 6*d.* to his general account with his bankers; and in September, 1858, he purchased land, for the payment of which he drew £425 from the bank. At that time the defendant had about £300 standing to his credit, in addition to the £460 18*s.* 6*d.*

Down to the time when the defendant retired from the partnership, accounts were kept in the following manner: — Each partner kept a separate day-book, containing the receipts and payments by each partner; and these books were from time to time posted by a clerk into one joint cash-book; and, at the end of every year, a cash-balance was struck between the partners. "Bill Journals" were also kept, from which bills were made out to clients, and posted in a joint ledger. In 1855, after the defendant retired, a different system of book-keeping in some respects was adopted by the plaintiff and Ormond; but William Morse Crowdy (who was not in good health, and by the terms of the partnership-deed of the 14th of March, 1855, was at liberty to absent himself from the office when he thought fit, and was not obliged to devote more time to his profession than he pleased), did not join in these accounts, but continued to keep his own accounts in his accustomed mode, and within about six weeks of the end of every half-year, and sometimes oftener, sent an account on sheets of paper to his copartners of the receipts and payments by him, and of the state of clients' accounts. These accounts sometimes required further explanations and additions and corrections by William Morse Crowdy. An account of the above description was supplied by him before the end of 1857 to his copartners, made up to the end of October, 1857; and, in February, 1858, he delivered to Ormond a similar account to the 31st of December, 1857. In June, 1858, the plaintiff personally investigated the partnership accounts, for the purpose of ascertaining the amount of the profits in the three years preceding the 31st of December, 1857, having before him (*inter alia*) the accounts rendered by William Morse Crowdy to the end of October, 1857, but not the account of that partner to the 31st of December, 1857, which was then in the possession of Ormond, who was absent from home from May to July, 1858.

The plaintiff made an estimate of the business done by William Morse Crowdy in November and December, 1857, which estimate turned out to be substantially correct. The result of this investigation and calculation as then made by the plaintiff (which occupied parts of several days, and was reduced into written figures) showed that a moiety of the net profits of the partnership business for the three years from the 1st of January, 1855, to the 31st of December, 1857, exceeded £1800; and, upon that calculation so made, and under the impression and belief that the said moiety of the profits amounted to £1800, the £460 18*s.* 6*d.* was paid to the defendant as already mentioned. Additional particulars and explanations and receipts

and payments by William Morse Crowdy during some parts of the three years were supplied by him to his copartners after June, 1858; so that, at the period of the payment of the £460 18*s.* 6*d.*, as between William Morse Crowdy and the plaintiff and Ormond, the partnership accounts were not in fact, and were not treated by the partners as, finally settled to the 31st of December, 1857. The additional particulars, however, did not reduce the amount of net profits. Nevertheless, the mode of keeping the accounts made it difficult to ascertain with precise accuracy the profits to any given period.

Between October and December, 1858, the plaintiff, in consequence of a statement by his partner Ormond, made a fresh investigation and calculation of the partnership accounts for the three years ending the 31st of December, 1857; and, according to the calculation then made by the plaintiff, a moiety of the net profits of the partnership business for the period aforesaid amounted to a sum less than £1800.

In October, 1858, the plaintiff's partner, Mr. Ormond, intimated verbally to the defendant, that the total net profits of the partnership were under £1200 a year; but no communication was made by the plaintiff to the defendant until March, 1859, when the plaintiff's attorney addressed to the defendant a letter applying for payment of £288 19*s.* 3*d.*, the difference between £1800 and £1511 0*s.* 9*d.*, the sum at which the plaintiff, as last above-mentioned, calculated the amount of a moiety of net profits for the three years.

The defendant does not admit that one moiety of the whole net profits of such business during the said three years fell short of £1800 by the sum of £288 19*s.* 3*d.*

The question for the opinion of the court, was, — whether the plaintiff, having paid the sum of £450 to the defendant on the 30th of June, 1858, in the manner and under the circumstances above stated, is now entitled to recover from the defendant the sum, if any, which he might have claimed to deduct from such payment at that date.

If the court should be of opinion that he is, then judgment is to be entered for the plaintiff, with costs, including the costs of and incident to this case, for such sum as may be found due to him upon investigation of the accounts, as provided for by the judge's order.

If the court should be of a contrary opinion, or if, upon such investigation of the accounts, no sum shall be found due to the plaintiff, then judgment is to be entered for the defendant, with costs, including the costs of and incident to this case.

Montagu Chambers, Q. C. and *Macnamara* for the plaintiff.

Manisty, Q. C. for the defendant.

Erle, C. J. I am of opinion that our judgment in this case should be for the plaintiff. He paid £450 upon the faith of the moiety of the profits of the partnership business for the three years ending on the 31st of Decem-

ber, 1857, having amounted to £1800. The £450 was to become due only upon that state of facts; and the plaintiff in June, 1858, paid it in the belief that that state of facts did exist. After he had so paid the money, viz., between October and December of that year, upon going more minutely into the accounts, he discovered his mistake: and in March, 1859, he demanded back the sum which he conceived he had paid in excess. I think the plaintiff never intended when he made the payment in question to abandon his right of investigating the accounts. If he had done so, then, according to the cases, he could not be allowed to retrace his steps. But here the plaintiff only paid the money because he believed the fact to exist which would entitle the defendant to receive it. It seems, from a long series of cases, from Kelly *v.* Solari,[1] down to Dails *v.* Lloyd,[2] that, where a party pays money under a mistake of fact, he is entitled to recover it back, although he may at the time of the payment have had means of knowledge of which he has neglected to avail himself. If there had been any stipulation that the amount of profits should be settled and ascertained by a given time, I should have been of opinion that it was not competent to the plaintiff afterwards to reopen the accounts, and demand back the money he had paid. But I do not find any such provision in the deed. Liberty is reserved to the plaintiff to examine the books: but I do not think the omission to exercise that right within any given time authorizes the defendant to retain this money. The fact of the claim being brought forward at a late period may seem to cast some slight suspicion on it; and, if there were any reason to suppose that the plaintiff had lain by and omitted to investigate the accounts until the complication of matters had operated injuriously upon the defendant's position, the case might have fallen within some of the authorities which have been referred to by Mr. *Manisty*. But no such thing is suggested here.

WILLIAMS, J. I am entirely of the same opinion. No doubt, at one time the rule that money paid under a mistake of fact might be recovered back, was subject to the limitation that it must be shown that the party seeking to recover it back had been guilty of no laches. But, since the case of Kelly *v.* Solari,[1] it has been established that it is not enough that the party had the means of learning the truth if he had chosen to make inquiry. The only limitation now is, that he must not waive all inquiry. Upon the facts of this case, I think the plaintiff is entitled to recover.

WILLES, J. I am of the same opinion. This is the simple case of one paying another money which both at the time suppose to be due, but which afterwards turns out, in consequence of a mistake of fact on the part of the payer, not to have been really due. In such a case the law clearly is that the money may be recovered back. The only distinction is between error or mistake of law, for which the payer is responsible, and error or mistake of fact, for which he is not.

[1] 9 M. & W. 54. [2] 12 Q. B. 531 (E. C. L. R. vol. 64).

BYLES, J. I am of the same opinion. Kelly *v.* Solari was distinctly recognized in Bell *v.* Gardiner, in this court, and by Dails *v.* Lloyd, in the Court of Queen's Bench, to this extent, that you may always rip up accounts which have been settled between parties who have acted under mistake or misapprehension of the facts. I think these cases are based upon a perfectly sound principle. Suppose an executor whose testator's name was John Smith had a promissory note signed "John Smith" presented to him for payment, and he, mistakenly supposing it to be the note of his testator, paid it, would he not be entitled to recover back the money?[1] Here, the money was paid by the plaintiff under a mistake, both parties being under an impression that it was due. That being so, it was manifestly against conscience that the defendant should retain it. The law very properly casts upon the person who makes the payment the burthen of showing that it was made under a mistake. That being proved, it would be inequitable not to permit him to recover it back. All the three courts have held that the right to recover back money so paid is not fettered by the condition suggested, that there shall not only be absence of knowledge, but also absence of the means of knowledge of the facts. I have nothing to add as to the particular circumstances of this case, except that it appears to me to be eminently a case for the application of the principle now so well established in Westminster Hall. *Judgment for the plaintiff.*

WHEADON *v.* OLDS.

IN THE SUPREME COURT OF JUDICATURE OF NEW YORK, OCTOBER, 1838.

[*Reported in* 20 *Wendell*, 174.]

THIS was an action of assumpsit, tried at the Onondaga circuit in March, 1836, before the Hon. DANIEL MOSELEY, one of the circuit judges.

The defendant agreed to sell to the plaintiff from 1600 to 2000 bushels of oats, at forty-nine cents per bushel. The delivery of the oats was commenced by removing them from a storehouse to a canal boat; tallies were kept, and when the tallies amounted to 500, it was proposed to guess at the remainder; and after a while it was agreed between the parties to call the whole quantity 1900 bushels, and the plaintiff accordingly paid for that quantity at the stipulated price. When the oats came to be measured it was ascertained that there were only 1488 bushels delivered. It was then found that the mistake had happened by both parties assuming as the basis of the negotiation fixing the quantity of 1900 bushels, that 500 bushels had been loaded in the boat at the time when they undertook to guess at the residue, whereas in fact only 250 bushels had been loaded, — the tallies

[1] See Walter *v.* James, L. R. 6 Ex. 124, 127; Tybout *v.* Thompson, 2 P. A. Bro. 27. — ED.

representing half bushels and not bushels, and that the parties supposed that the quantity loaded was not a quarter of the whole quantity. The vendor refusing to refund a portion of the money received by him, this action was brought by the purchaser, who declared for money had and received, and delivered a bill of particulars stating the contract between the parties, that the oats were delivered, and "that in measuring said oats a mistake was made, whereby the plaintiff paid the defendant for about 300 bushels more oats than he received." The defendant proved by one witness that the plaintiff said that he would take the oats at 1900 bushels hit or miss, and by another that he had acknowledged that he took the oats at that quantity at his own risk. He further proved that before the boat left the storehouse, on dissatisfaction being expressed by a friend of the plaintiff who was to advance the money for him, as to the mode of ascertaining the quantity, that he told them that if they were dissatisfied with the quantity, to put the oats back into the storehouse, and pay him for his trouble. When the evidence was closed the counsel for the defendant stated that he should not question the fact that the parties were mutually in error in supposing that 500 bushels of oats had been put on board, when in fact only 250 bushels had been put on board at the time of the bargain in reference to the quantity, but insisted that the bargain was obligatory upon the plaintiff, and that therefore he was not entitled to recover. He also insisted that the proof varied from the bill of particulars; and thirdly, that at all events the plaintiff was only entitled to recover for the deficiency of 250 bushels in the first estimated quantity. The judge charged the jury that if they should find that the parties at the time of the bargain in reference to the 1900 bushels were in error as to the quantity measured, and supposed that 500 bushels had been measured when in fact the quantity measured was only 250 bushels, and had based the bargain upon that supposition, then that the plaintiff was entitled to recover for the deficiency of the 1900 bushels. The jury found a verdict for the plaintiff for $190. The defendant moves for a new trial.

S. Stevens for the defendant.

J. L. Wendell for the plaintiff.

By the Court, COWEN, J. The objection of variance from the bill of particulars was too general. It should have been stated whether it was in quantity, or sum, or in what else.

The mistake as proved went not only to the quantity measured, but the jury found, under the charge of the judge, that relatively it influenced the entire agreement to take the oats at 1900 bushels. One ingredient of estimating the residue, as talked of, was the assuming that the supposed 500 bushels was one-fourth of the pile, which would operate unfavorably to the plaintiff, if he reasoned from the size of the smaller to that of the larger pile. Here was an admitted error, which certainly influenced the conduct of the plaintiff to the extent of 250 bushels; and, as we must take it on

the finding of the jury, to the full amount which the oats came short of the 1900 bushels. All the excess of payment arose from a count of half bushels as bushels. And the only question in the least open is, whether an agreement, based on that mistake, to accept the oats at the plaintiff's own risk of the quantity, shall conclude him. The mistake which entitles to this action is thus stated by the late Chief Justice SAVAGE from the civil law: "An error of fact takes place, either when some fact which really exists is unknown, or some fact is supposed to exist which really does not exist." Mowatt *v.* Wright.[1] He cites the words of 2 Ev. Poth. 437. And see 1 Dom. 248, B. 1, tit. 18, § 1, pl. 1. In judging of its legal effect, we must look "to the regard which the contractors have had to the fact which appeared to them to be true."[2] And when we see that the agreement is the result of such a regard, or, as the judge said to the jury, is based upon it, I am not aware of any case or dictum, that, because part of the agreement is to take at the party's own risk, or, as the parties expressed it here, hit or miss, it therefore forms an exception to the general rule. The agreement to risk was, *pro tanto*, annulled by the error. The money was paid under a contract void for so much as the oats fell short of 1900 bushels. The effect would have been different had the truth been known to the plaintiff. See Domat, as before cited. The foundation of the arrangement to take at the plaintiff's risk was a misreckoning, one number being put instead of another, "which," says Domat,[3] "is a kind of error in fact different from all other errors, in that it is always repaired."

The motion for a new trial is denied.

CHARLES H. STUART AND OTHERS *v.* JABEZ H. SEARS.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, NOVEMBER 15, 1875.

[*Reported in* 119 *Massachusetts Reports*, 143.]

CONTRACT by Charles H. Stuart, John H. Snow, and Ether S. Foss, partners under the firm name of Stuart, Snow & Foss, to recover $1000 for work done and materials furnished by the plaintiffs for the defendant. The declaration also contained a count for the same amount, as money had and received by the defendant to the plaintiff's use, and a count setting forth substantially the facts which appear in the evidence introduced by the plaintiffs.

At the trial in the Superior Court, before WILKINSON, J., the evidence on the part of the plaintiffs tended to prove that the defendant was liable to pay, and did pay, to the plaintiffs large sums of money, in many items, and at different times, due to the plaintiffs upon different contracts, and

[1] 1 Wend. 360. [2] 1 Dom. 250, B. 1, tit. 18, § 1, pl. 11. [3] pl. 12.

that an action was brought by the plaintiffs against the defendant to recover the balance due, and that, finally, on September 19, 1874, a final settlement was made between the plaintiffs and defendant, whereby the action was discontinued and a voucher given by the plaintiffs to the defendant, showing a total debit account to the plaintiffs of $63,520.29, and a credit account to the defendant containing the following item: "By cash sundry times, $46,700.00," and the following words, dated Boston, September 19, 1874, and signed by the plaintiffs: "The accounts of Jabez H. Sears are settled in full to this date."

There was in the account of the defendant an item of cash paid under date of March 13, 1874, $1000; and one other similar item of $1000 under date of May 13, 1874. On the plaintiffs' book there was a credit of $1000 under date of May 13, 1874, but no credit of $1000 under date of March 13, 1874. In other respects the accounts of the parties agreed. This discrepancy in the accounts was talked over by the parties before the settlement and efforts made to discover which was correct, and the settlement was delayed a week or more for that purpose.

As evidence of said payment, at the time of settlement the defendant produced a check for $1000, given by him to the plaintiffs, and taken up by him, dated March 13, 1874, and a receipt signed by the plaintiffs for $1000, "Mason work and materials," dated March 13, 1874.

The plaintiffs testified that, relying upon the accuracy of the date of the check and receipt, they allowed in the settlement the $1000 charged in defendant's account under date of March 13, 1874. The plaintiffs then offered evidence tending to show that the true date of the check and receipt was May 13, 1874; that the check was presented to the bank May 15, 1874; that the receipt and check were intended for the payment made by the defendant May 13, 1874, and that the allowance of it, March 13, 1874, was a mistake, and that thereby they had given the defendant credit for $1000 more than he had in fact paid.

The defendant asked the judge to instruct the jury that, if at the time of said settlement the plaintiffs on an examination of the evidence, in the absence of fraud on the part of the defendant, decided to allow said disputed item of $1000 and did allow it, and said settlement was effected accordingly, this action cannot be maintained.

The judge declined so to instruct the jury, but did instruct them that if there was a doubtful claim settled by way of compromise, without fraud, the plaintiffs could not recover; but if the defendant produced, at the time of settlement, either by fraud or mistake, the check and receipt of March 13, 1874, as evidence of a payment of $1000 at that time, when in fact they were intended to cover the payment in May, and the plaintiffs were misled and induced thereby, erroneously, to allow the charge of $1000, under date of March 13, 1874, when no such payment had been made, the plaintiffs were entitled to recover the same back.

charge.

The jury returned a verdict for the plaintiffs; and the defendant alleged exceptions to the above refusal and ruling.

B. Dean for the defendant.

W. H. Towne for the plaintiffs.

Gray, C. J. The instructions to the jury were in exact accordance with the well settled law. If the sum now sued for was allowed in the settlement between the parties, without fraud, by way of compromise of a doubtful claim, it could not be recovered back; but if it was paid by the plaintiffs, relying upon erroneous vouchers produced by the defendant at the time of the settlement, it might, even if there was no fraud, be recovered back as money paid by mistake. Riggs *v.* Hawley;[1] Merchants' National Bank *v.* National Eagle Bank;[2] Paige *v.* Sherman;[3] Union Bank *v.* Bank of United States.[4]

Exceptions overruled.

FIRST NATIONAL BANK OF OMAHA *v.* THE MASTIN BANK AND KERSEY COATES, Assignee.

In the Circuit Court of the United States for the Eighth Judicial District, October, 1880.

[*Reported in* 2 *McCrary*, 438.]

This case is submitted to the court for final decision upon an agreed statement of facts, from which it appears that the plaintiff and the Mastin Bank, between July 1 and August 1, 1878, had maintained a correspondence and account, and had remitted to one another divers sums of money, and also demands, notes, bills, and accounts against third parties for collection and credit. On the twenty-seventh of August, 1878, the Mastin Bank, then having a considerable balance in the hands of the plaintiff, directed the plaintiff to remit said balance to the Metropolitan National Bank of New York, to the credit of the Mastin Bank, in even hundreds of dollars. At the time the books of the plaintiff showed a balance due the Mastin Bank of a little more than $8800; and accordingly the plaintiff remitted to the said Metropolitan National Bank of New York $8800, to be placed to the credit of the Mastin Bank. Prior to that time, however, the plaintiff had sent to the Mastin Bank for collection a draft drawn by one Faut for $3141, which said Mastin Bank had collected on the seventeenth of July, and duly credited the plaintiff on its books; but the plaintiff by mistake omitted to charge the said sum to the Mastin Bank, and therefore sent to the Metropolitan National Bank a larger amount of money than was due to the Mastin Bank. A few days after this transaction the Mastin Bank

[1] 116 Mass. 596, 598.

[2] 101 Mass. 281, 285.

[3] 6 Gray, 511.

[4] 3 Mass. 74.

failed and made an assignment to the respondent, Kersey Coates, assignee, under the laws of the state of Missouri, transferring to him all its property and credits of every kind whatsoever. The assignee demanded and received from the Metropolitan National Bank the money held by it to the credit of the Mastin Bank, including the sum which plaintiff had sent to it by mistake, and which it is agreed amounts, less certain credits, to $1816.22. Plaintiff, as soon as advised of the mistake, demanded the return of the money from the Mastin Bank, as well as from the Metropolitan National Bank, and also made the same demand upon the assignee after his appointment.

J. M. Woolworth for complainant.

Pratt, Brumback & Ferry for respondent.

McCrary, Circuit Judge. — The fact is admitted by the agreed statement that plaintiff sent to the Metropolitan National Bank in New York, to be placed to the credit of the Mastin Bank, the money now in controversy in consequence of a mistake of fact. When plaintiff stated the account in order to ascertain the sum to be sent to the New York Bank, one item thereof was omitted by reason of an error of the accountant, or because the bank had not received notice at that time of the collection, by the Mastin Bank, of the Faut draft. The result of the transaction was that the plaintiff sent to the Metropolitan National Bank, to be credited to the Mastin Bank, more money than was due to the latter; or, in other words, there was placed in the hands of said Metropolitan National Bank $1816.22 which did not, in equity, belong to the Mastin Bank. It was, however, placed to the credit of that bank, and after the assignment it passed into the hands of the assignee.

As between the original parties to this transaction it cannot be claimed that the Mastin Bank acquired any interest in or right to the money now in dispute. It is a principle of equity too plain to require a citation of authorities to support it, that where one person, by mistake, delivers to another money or property without consideration, he may recover it back; and where the identical property cannot be found and recovered, equity permits him to pursue and recover the proceeds wherever he can find them, unless they have passed into the hands of an innocent holder. Where both parties intended the delivery of a particular sum of money, and where, by the mistake of both, a larger sum[1] was delivered, the party receiving the excess becomes, in equity, a trustee for the real owner thereof and bound to deliver it upon demand to him. The ground upon which this rule proceeds is, that mistake or ignorance of facts is a proper subject of relief when it constitutes a material ingredient in the contract or acts of the

[1] Conf. Utica Bank *v.* Van Gieson, 18 Wend. 435.

It was held in Lamb *v.* Cranfield, 43 L. J. Ch. 408, by Jessel, M. R., that the sole remedy for the recovery of money so paid was at law. See, however, Bingham *v.* Bingham, *supra*, 73; Henderson *v.* Overton, 2 Yerg. 394; Neal *v.* Read, 7 Bax. 334. — Ed.

parties, and disappoints their intention by a mutual error, or where it is inconsistent with good faith, and proceeds from the violation of the obligations which are imposed by law upon the conscience of either party.[1]

It is equally clear that the plaintiff has a right to relief against the assignee who claims by a general assignment under the laws of Missouri, for the reason that the assignee is deemed to possess the same equities only as the debtor himself would possess.[2]

It is my opinion that upon the principles of equity the plaintiff is entitled to recover the sum of money in controversy in this suit, and decree will be entered accordingly.

(*d.*) *A claim may be paid under a Mistake as to a Collateral Fact.*

HARRIS AND ANOTHER, ASSIGNEES OF CARTER *v.* LOYD.

IN THE EXCHEQUER, TRINITY TERM, 1839.

[*Reported in* 5 *Meeson & Welsby*, 432.]

ASSUMPSIT for money had and received. Plea, *non assumpsit.* At the trial before Lord DENMAN, C. J., at the last Warwick Assizes, the plaintiffs, who sued as assignees of Carter under a trust-deed for the benefit of creditors, sought to recover from the defendant, the sheriff of the county of Warwick, the sum of 57*l.*, being the amount of an execution levied on the goods of Carter. It appeared that the assignment to the plaintiffs was executed on the 5th June, 1838. On the same day, but before the execution of the assignment, a writ of *fi. fa.* against the goods of Carter was delivered to the sheriff's agent in London, and a warrant granted thereon, under which the officer took possession on the 6th. The plaintiffs, in order to release the goods, paid the officer the amount of the levy, under protest, and he thereupon withdrew from possession. It subsequently turned out that Carter had committed an act of bankruptcy on the 2d of June, on which a fiat issued on the 18th, and the plaintiffs thereupon brought this action to recover back the money so paid to the sheriff's officer, as having been paid under a mistake of fact, they not having at the time had any knowledge of the act of bankruptcy. The Lord Chief Justice was of opinion that this was not such a mistake of fact as entitled the plaintiffs to recover back the money, and accordingly directed a nonsuit, but gave leave to the plaintiffs to move to enter a verdict for 57*l.*

In Easter term, Balguy obtained a rule *nisi* accordingly, against which *Humfrey* and *Hayes* now showed cause.

Balguy and *Flood, contra.*

[1] Story Eq. Jur. § 151. [2] Story Eq. Jur. § 1228.

Lord ABINGER, C. B. I am of opinion that this rule ought to be discharged. The plaintiffs appear to have been mere volunteers. Suppose the friends of the debtor had paid the money, and the possession of the goods had been thereupon delivered back to him; could they have recovered it back, upon its afterwards turning out that he had previously committed an act of bankruptcy? The plaintiffs claim under a deed of assignment, and pay the money, supposing that under it they have a right to the goods; in that they are mistaken. But the goods were liable to seizure; the property in them was not indeed divested by the writ, and the trustees might take them, but only subject to the right of the execution creditor. Then it is said the delivery of the writ was not to the sheriff, but only to his agent in London; I think that makes no difference whatever. The short answer, however, to the action is, that the money was not paid under a mistake of fact, but upon a speculation, the failure of which cannot entitle the plaintiffs to recover it back.

ALDERSON, B. This is money paid, not under a mistake, but under a bargain. True, it turns out to be a bad bargain; but that will not affect its validity. But further, the money is paid to the sheriff for the purpose of being paid over to the execution creditor, subject only to the plaintiffs' supposed right under the deed. By the delivery of the writ to the sheriff the goods are bound, and the property in them cannot afterwards be transferred by the debtor, except subject to the interest of the execution creditor. There can be no doubt that the delivery to the deputy in London is a delivery to the sheriff; the deputy is appointed for that very purpose. The plaintiffs were wrong, and the sheriff right, at the time of the payment, and it was the duty of the sheriff to pay over the money to the execution creditor. Can it be argued, that after such payment over, he can be compelled to refund it? I think not. I am of opinion, therefore, that the rule ought to be discharged.

GURNEY, B., and MAULE, B., concurred.

Rule discharged.

AIKEN, PUBLIC OFFICER, ETC. *v.* ELIZABETH SHORT, EXECUTRIX OF FRANCIS SHORT.

IN THE EXCHEQUER, JUNE 7, 1856.

[*Reported in* 1 *Hurlstone & Norman*, 210.]

ACTION for money had and received. Plea never indebted.

At the trial before PLATT, B., at the Middlesex sittings, in last Hilary term, the following facts were proved: The defendant was the widow and sole executrix of Francis Short, who died in 1853. One Edwin Carter had made a will, dated February 1846, by which he gave his property equally

amongst his eight brothers and sisters, of whom George Carter was one. This will was proved after his death, which took place in 1847, by John Carter the younger. George Carter being largely indebted to Stuckey's Banking Company, by deed dated the 15th January, 1855, conveyed to the banking company his one-eighth share in the property of Edwin Carter, to which he professed to be entitled under this will, subject to the charges upon it. George Carter was at that time indebted to the defendant, as executrix of Francis Short, in the sum of 200*l.*, which was secured by an equitable mortgage of the property devised to him by Edwin Carter's will, and by the joint and several bond of George Carter, John Carter, and Charles Carter, dated October, 1850. The equitable charge was recited in the deed of the 15th January, and at the time of the execution of that deed it was agreed, as between George Carter and the bank, that the bank should pay off this sum of 200*l.* and interest. In May, 1855, the bank made arrangements to sell the property. Before the execution of the conveyance one Richardson, acting as attorney for the defendant, applied to the bank for payment of the 200*l.*, and interest, stating that he had applied to George Carter, who had referred him to the bank. The bank accordingly, through their attorney, paid to the defendant the sum of 226*l.* 16*s.* 6*d.* The bond and instrument of mortgage were handed over by the defendant to the bank, and they took a receipt for the money due on the bond and mortgage. In August, 1855, John Carter produced a will of Edwin Carter, dated April, 1846, which appeared to be the true last will of Edwin Carter. This will, the existence of which had been kept secret by the Carters, had been prepared in the office of Francis Short, the defendant's testator, and was attested by him. Under this will George Carter took only an annuity of 100*l.*, which ceased upon his making any assignment. The bank then applied to the defendant to refund the 226*l.* 16*s.* 6*d.* previously paid by them to her, and on her refusal to repay the money brought the present action to recover it back. Upon these facts, the learned judge directed a verdict for the plaintiff, reserving leave to the defendant to move to enter a verdict for him.

Montague Smith in the same term obtained a rule *nisi* accordingly, against which

Knowles and *Field* now showed cause.

M. Smith and *Gray* in support of the rule.

Pollock, C. B. We are all of opinion that the rule must be absolute. The case, when examined, is quite clear, and the facts lie in a narrow compass. The defendant's testator, Short, had a claim on Carter, — a bond and a security on property which Carter afterwards mortgaged to the bank. The defendant, who was the executrix of Short, applied to Carter for payment. He referred her to the bank, who, conceiving that the defendant had a good equitable charge, paid the debt, as they reasonably might do, to get rid of the charge affecting their interest. In consequence

of the discovery of a later will of Edwin Carter, it turned out that the defendant had no title. The bank had paid the money in one sense without any consideration, but the defendant had a perfect right to receive the money from Carter, and the bankers paid for him. They should have taken care not to have paid over the money to get a valueless security; but the defendant has nothing to do with their mistake. Suppose it was announced that there was to be a dividend on the estate of a trader, and persons to whom he was indebted went to an office and received instalments of the debts due to them, could the party paying recover back the money if it turned out that he was wrong in supposing that he had funds in hand? The money was, in fact, paid by the bank, as the agents of Carter.

Platt, B. I am of the same opinion. The action for money had and received lies only for money which the defendant ought to refund *ex æquo et bono*. Was there any obligation here to refund? There was a debt due to Short, secured by a bond and a supposed equitable charge by way of collateral security. The property on which Short had the charge was conveyed by Carter to the bank. Short having died, the defendant, his executrix, applied to George Carter for payment of the debt due to her husband, the testator. Carter referred her to the bank, who paid the debt, and the bond was satisfied. The money which the defendant got from her debtor was actually due to her, and there can be no obligation to refund it.

Bramwell, B. My brother Martin, before he left the court, desired me to say that he was of the same opinion, and so am I. In order to entitle a person to recover back money paid under a mistake of fact, the mistake must be as to a fact which, if true, would make the person paying liable to pay the money; not where, if true, it would merely make it desirable that he should pay the money.[1] Here, if the fact was true, the bankers were at liberty to pay or not, as they pleased. But relying on the belief that the defendant had a valid security, they, having a subsequent legal mortgage, chose to pay off the defendant's charge. It is impossible to say that this case falls within the rule. The mistake of fact was, that the bank thought that they could sell the estate for a better price. It is true that if the plaintiff could recover back this money from the defendant, there would be no difficulty in the way of the defendant suing Carter. In Pritchard *v.* Hitchcock[2] a creditor was held to be at liberty to sue upon a guarantee of bills, though the bills had been in fact paid, but the money afterwards recovered back by the assignees of the acceptor, as having been paid by way of fraudulent preference. But that does not show that the plaintiffs can maintain this action, and I am of opinion they cannot, having voluntarily parted with their money to purchase that which the defendant had to sell, though no doubt it turned out to be different to, and of less value than, what they expected.

Rule absolute.

[1] See Wilson *v.* Thornbury, L. R. 10 Ch. 239.

[2] 6 M. & G. 151.

CHAMBERS *v.* MILLER AND OTHERS.

IN THE COMMON PLEAS, NOVEMBER, 20, 1862.

[*Reported in* 13 *Common Bench Reports, New Series,* 125.]

THIS was an action for an assault and false imprisonment. The defendants justified the assault under the circumstances hereinafter stated.

The cause was tried before ERLE, C. J., at the sittings in London after the last term. The facts which appeared in evidence were as follows:— The plaintiff, who was clerk to a merchant at Sunderland, went to the banking-house of Woods & Co. at that place (the defendants), and presented to one of the cashiers named Armstrong a check for 151*l.* 10*s.* 6*d.*, drawn upon the bankers by one of their customers. Armstrong — who had been absent a few weeks from the bank, and therefore was not aware that the drawer's account was insufficient to meet the check — received the check, and took the amount from the till in notes, gold, and silver, and placed it on the counter and went away. The plaintiff drew the money towards him, counted it over, and was in the act of counting it a second time, when the cashier (who had in the mean time ascertained on inquiry that the account of the drawer was very considerably overdrawn) returned and said that the check could not be paid. The plaintiff, however, having possession of the money, put it in his pocket; whereupon the cashier detained him until he returned the money, under a threat of giving him into custody on a charge of stealing it, and restored the check uncancelled, which was afterwards presented to the drawer and paid by him.

Upon these facts, his Lordship ruled that the property in the money had passed to the bearer of the check, and consequently that the defendants' justification failed.

The jury returned a verdict for the plaintiff, damages 20*l.*

Bovill, Q. C., on a former day in this term, pursuant to leave reserved to him at the trial, obtained a rule *nisi* to enter a verdict for the defendants. He submitted, that, as the plaintiff was still counting the money at the time the payment was recalled, there had been no complete acceptance on his part to vest the property in him; and that, at all events, the money was recoverable back, as having been paid under a mistake of fact, upon the principle laid down in the cases cited in the notes to Marriot *v.* Hampton.[1]

Overend, Q. C., and *Lewers* now showed cause.

Bovill, Q. C., *Manisty*, Q. C., and *T. Jones*, in support of the rule.

ERLE, C. J. I am of opinion that this rule should be discharged. This

[1] 7 T. R. 269; 2 Smith's L. C. 5th Ed., 356, *et seq.*

is an action for a trespass committed by the defendants, in assaulting and imprisoning the plaintiff under a plea that certain money which was in the pocket of the plaintiff was the property of the defendants, and that the latter had a right to detain him and take it from him. The question reserved for our consideration — and upon which we are called upon to decide both as judge and jury — is, whether, under the circumstances proved at the trial, the money had passed to the plaintiff or still remained the property of the defendants. The ordinary rule of law is, that the property in a chattel passes according to the intention of the parties. In an ordinary transaction of sale, where the proposed seller says to the proposed buyer, "I will sell you such and such goods at such a price," the assent of the buyer signified by the word "done" is enough to fix the right of property. In the case of a gift, the property passes by delivery. And so with all the ordinary transactions of life. With regard to checks, the well-known course of business is this, — When a check is presented at the counter of a banker, the banker has authority on the part of his customer to pay the amount therein specified on his account. The money in the banker's hands is his own money. On presentment of the check, it is for the banker to consider whether the state of the account between him and his customer will justify him in passing the property in the money to the holder of the check. In this case, the banker's clerk had gone through that process, and so far as in him lay, did that which would pass the property in the money to the plaintiff. He counted out the notes and gold and placed them on the counter for the plaintiff to take up. It no longer remained a matter of choice or discretion with him whether he would pay the check or not. The plaintiff had taken possession of the money, counted it once, and was in the act of counting it again, when the clerk, who had gone from the counter, finding that there was a mistake, not as between him and the bearer of the check, but as between him and the customer, returned and claimed to revoke the act of payment which on his part was already complete, and claimed to have the money back. Now, the bankers had parted with the money, and the plaintiff had accepted it. It is true he had not finished counting it, and that, if he had found a note too much or a note short, there was still time to rectify the mistake. But, according to the intention of the parties, and the course of business, the money had ceased to be the money of the bankers, and had become that of the party presenting the check. It was the clear opinion of the jury that the property passed: and equally clear am I, if it was a question of law for me, that the bankers did, by that which took place, pass the property in the money to the holder of the check. On that ground I am of opinion that the plaintiff is entitled to retain his verdict. That which passed amounted to payment of the check; and the plaintiff was entitled to retain the money. Some of the cases which were cited might be applicable if the customer had obtained by mistake from the banker money to which he was not

entitled. In Kelly *v.* Solari,[1] the administratrix was not entitled to receive the money. The policy under which the payment had been made to her was a lapsed policy, and the money was paid under a mistake of fact. That being so, and it being against all equity and good conscience that she should retain it, the money was held to be recoverable back. But, as between the parties here, there was no manner of mistake. The banker's clerk chose to pay the check; and the moment the person presenting the check put his hand upon the money it became irrevocably his.

Williams, J. I am entirely of the same opinion. Drawing the inference which is fairly deducible from the facts proved, it seems to me that the person who acted as cashier of the bank upon the occasion in question meant to part with the money, and that the person who presented the check meant to receive it and did receive it. There was a complete and absolute transfer of the money under the authority of the drawer of the check. It is said that the transaction was not complete, because the plaintiff had not finished counting the money, and therefore that he did not consider that the matter had come to an end. I cannot by any means assent to that. The recipient had a right to count the money or he might if he pleased have taken it off the counter without counting it. I see no ground whatever for saying that the transaction was incomplete. There was no evidence that anything further remained to be done to complete it. The act of counting was no indication on the part of the plaintiff that he had not accepted the money. That argument was founded upon a mistaken view of the mode in which the question arises. Where money is paid, not in performance of a promise, at the precise day on which it ought to have been paid, but in satisfaction of a breach of promise, there must be not only payment but acceptance in satisfaction. That, however, is not so where the payment is made in performance of an agreement on the precise day, or where the creation of the right to receive the money and the act of payment are simultaneous. In these cases, where the money finds its way into the hands of the person to whom the payment is to be made, the transaction is complete. If, in this case, after the money had been placed by the cashier upon the counter, and drawn towards him by the plaintiff, a thief had come in and stolen it whilst he was in the act of counting it, the loss would clearly have fallen upon the plaintiff, and the bankers would not have been under any obligation to pay the amount over again. Then it is said, that, the money having been paid under a mistake of fact, money had and received would lie to recover it back, and therefore that the defendants were justified in seizing the plaintiff and forcibly regaining possession of it. It is quite unnecessary to consider that. There was no mistake of fact within the meaning of the rule on the subject. One acting as the cashier of the bank, with the authority of the bankers, transfers the possession of the money to the plaintiff under an impression that he is the

[1] 9 M. & W. 54.

bearer of a genuine check, and takes the check from him in the ordinary way. All the facts are precisely as the cashier apprehended them. There is no mistake. It may be, that, if the cashier had at the time been aware of the state of the customer's account, he would not have paid the check. But, if we were to go into all the remote considerations by which parties may be influenced, it would be opening a very wide field of conjecture, and would lead to infinite confusion and annoyance.

Byles, J. I am of the same opinion. The property in the money passed to the recipient, and the check was paid. It is true that the money remained upon the banker's counter. But a banker's counter is no more than a table which is provided by the banker for the more convenient carrying on cash transactions between him and his customers and those who come to pay and receive money there; and the same rule must be applied whether the payment is made from one side of the counter or the other. Here, the check was received by the cashier, and the money handed over to the person presenting it. The latter had counted the money once, and was in the act of counting it again, when the cashier claimed a right to recall it. I must confess that I should be inclined to hold, as matter of law, that, so soon as the money was laid upon the counter for the holder of the check to take, it became the money of the latter. It has been suggested that it was still competent to the party to object to one of the notes,— for instance, that it was forged. What then? The only consequence would be that he would have a right to demand another note in place of it. His right to rescind the transaction so far would not prevent the property in the rest from vesting in him. The only point upon which I have felt any hesitation, is, whether there could be any retractation of the payment. I think, however, it would be extremely dangerous, and would create a great sensation in the city of London, if it were to be held in Westminster Hall, that, after a check had been regularly handed over the banker's counter and the money received for it, and in the act of being counted, the banker might treat the check as unpaid, because he has subsequently to his taking the check and handing over the amount ascertained that the state of the customer's account was unfavorable. If it were so held, it certainly would be so for the first time. This was not a payment made under any mistake of facts. The bankers (or their agent, the cashier) had full notice in writing of all the facts. And, even if this had been a payment made under such a mistake of facts as would have entitled the bankers to recover back the money from the holder of the check, by an action for money had and received, I must entirely withhold my assent from the proposition that they could justify the act of seizing the person to whom they had voluntarily paid the money, and picking his pocket. I am quite aware that a question has lately arisen, as to whether or not a party (or his servants) whose property is wrongfully in another's possession may by retaking it administer summary redress to himself. But, be that

as it may, when the subject-matter in question is money, the possession and the property in which are inseparable, I entertain no doubt whatever that he could do nothing of the sort. For these reasons, it appears to me that there has been no failure of justice here, and that the plaintiff is entitled to retain his verdict.

Keating, J. I also am of opinion, upon the facts proved in this case, that the verdict should stand. I cannot for a moment doubt that the delivery of the money by the cashier to the holder of the check was complete, and that the property in it vested in the latter. The cashier counted out the money, and placed it on the counter for the purpose and with the clear intention of putting it under the control of the person who presented the check. This was no conditional payment, — as if the cashier had said to the party, "I hand you this money in payment of the check, on condition of your counting it, and assenting to its correctness." Suppose the plaintiff had been content to take up the money without stopping to count it, — could anybody doubt that the property would have passed? It does not the less pass because the recipient chooses to count it before he puts it into his pocket. If, then, the property passed, the other question does not arise. No case has ever yet held that a party has a right to retake by force property which has already passed and vested in another. Mr. *Manisty* has suggested, that, even if the property passed by the act of payment, it only passed in a qualified and limited manner, leaving the banker at liberty to revoke the payment on discovering that the customer had not sufficient effects in his hands. I cannot assent to that proposition. Having once parted with the money *animo solvendi*, it was out of his power to recall it. The plaintiff is clearly entitled to retain his verdict.

Rule discharged.[1]

MERCHANTS' NATIONAL BANK *v.* NATIONAL EAGLE BANK.

In the Supreme Judicial Court of Massachusetts, March, 1869.

[*Reported in* 101 *Massachusetts Reports*, 281.]

Contract to recover the amount of a check drawn on the plaintiffs by John R. Williams, payable to the order of Hubbard Brothers, and by them indorsed and deposited with the defendants. At the trial in the Superior Court, before Ames, C. J., the material facts appeared as follows: —

The plaintiff and defendant banks were members of the Boston Clearing House Association, which was formed by banks in Boston "for the purpose," as expressed in the preamble of their articles of association, "of effecting a more perfect and satisfactory settlement of the daily balances between them." In the second section of the articles signed by the banks consti-

[1] Pollard *v.* The Bank of England, L. R. 6 Q. B. 623, *accord.* — Ed.

tuting the association, it was set forth that "the objects of the association are the effecting, at one place and one time, of the daily exchanges between the several associated banks, and the payment, at the same place, of the balances resulting from such exchanges." By the eleventh section it was provided that "the hour for making the exchanges at the Clearing House shall be ten o'clock before noon, each day;" "at twelve o'clock, noon, the debtor banks shall pay to the manager at the Clearing House the balances due from them respectively;" and "at half past twelve o'clock after noon the creditor banks shall receive from the manager, at the same place, the balances due to them respectively, provided all the balances due from the debtor banks shall then have been paid to him." The thirteenth section provided that "errors in the exchanges, and claims arising from the returns of checks or other cause, are to be adjusted directly between the banks which are parties therein, and not through the Clearing House;" and a subsequent section was as follows: "Whenever checks are sent through the Clearing House which are not good, they shall be returned, by the banks receiving the same, to the banks from which they were received, as soon as it shall be found that said checks are not good; and in no case shall they be retained after one o'clock."

It was the usage for each bank "each morning, at ten o'clock, to have at the Clearing House, for the purpose of effecting settlements with other banks, all the checks and other demands, such as bills, etc., it had received against all the other banks during the preceding day, making them up into separate bundles for each bank, with a ticket containing the items and aggregate of the contents of each bundle; the settlement was made at the Clearing House upon the footings of these tickets, without regard to the fact whether the contents of the bundle were correctly ticketed, or formed good claims against the bank charged with the contents of the bundle as per ticket; and in from ten to fifteen minutes past ten o'clock the messenger from each bank was able to receive and take to his bank all the claims of the other banks against it." Each bank was known at the Clearing House by a particular number.

The plaintiffs' evidence showed that Hubbard Brothers deposited the check with the defendants on Saturday, June 15, 1867, but, as the banks were all closed on Monday, the 17th, it was not, and could not be, sent to the Clearing House until Tuesday, June 18. In the forenoon of the last named day the defendants sent it to the Clearing House in their bundle of demands against the plaintiff bank, and the amount of it was allowed to them in their settlement with the Clearing House later in the day. At about quarter past ten o'clock, the plaintiffs' messenger returned from the Clearing House and delivered to their paying teller the various bundles of demands against them; and the teller, with an assistant, proceeded to open and examine them in the regular course of business of the plaintiffs; ascertaining whether the contents of each bundle corresponded with the

ticket, and whether each check was in fact drawn upon the plaintiffs and was properly signed and indorsed; marking the checks with the respective numbers of the banks which sent them to the Clearing House; and finally assorting them into three piles, and giving each pile to a bookkeeper to examine whether the drawers of the checks contained in it had funds deposited to meet the amounts drawn for. It was nearly twelve o'clock, when the teller finished his examination so far as to deliver the piles of checks to the bookkeepers; and at half past twelve, the check in question, with three others, each drawn by Williams, and sent to the Clearing House from four different banks, were returned to him by the bookkeepers as not good, there being no funds to meet them. At a quarter before one o'clock, and "as soon as he could in the performance of his other duties," the teller handed the four checks to the messenger, with directions to return them to the banks, with whose numbers they were marked, as not good, and to collect the amounts of them from those banks. The messenger made a mistake as to the number on one of the checks, went to the wrong bank with it, and was obliged to return to the plaintiffs' banking-house in order to ascertain the true number. In consequence of this mistake, it was from five to seven minutes after one o'clock when he presented the check in question at the defendants' banking-house, where payment of it was refused by the defendants on the ground that it had not been presented before one o'clock.

The defendants asked the judge to rule that the plaintiffs could not maintain their action, "upon the ground that, on the plaintiffs' own showing, the check was not presented to the defendants until after one o'clock of the day upon which it was left at the Clearing House, and by the articles of association the defendants were not liable to refund the amount of a check not good, unless it was presented to them at or before one o'clock of the day when it was sent to the Clearing House; and that the requirements in regard to the return of checks were to be availed of by the depositing bank as well for the protection of its depositors as for itself." But the judge ruled "that the Clearing House Association was an agreement between the banks for their own benefit and guidance; that, if the plaintiffs delivered the check to a messenger before one o'clock, to be returned to the bank depositing it, in the usual course of their business, and with time sufficient, in the absence of any accident or mistake, to reach the depositing bank by one o'clock, it would be a compliance with the vote, especially in view of the language of the vote that the bank should not retain the checks after one; but that, irrespective of this peculiar wording of the vote, the failure of the bank to return a check by one o'clock could be a defence to the depositing bank only to the extent that such bank was injured by such delay; and that, if the bank could show that it had changed its position after one, in consequence of the non-return of said check, the vote of the Clearing House would protect it."

Under these rulings, the defendants declined to offer evidence; and a verdict was taken for the plaintiffs, and the case reported for the revision of this court.

C. B. Goodrich for the defendants.

S. Bartlett and *D. Thaxter* for the plaintiffs.

COLT, J. This action is brought by the plaintiffs to recover the amount of a check drawn upon them and paid by them through the agency of the Boston Clearing House, there being no funds of the drawer in their hands at the time of the payment.

It is well settled by recent decisions that money paid to the holder of a check or draft drawn without funds may be recovered back, if paid by the drawee under a mistake of fact. And though the rule was originally subject to the limitation that it must be shown that the party seeking to recover back had been guilty of no negligence, it is now held that the plaintiff in such case is not precluded from recovery by laches in not availing himself of the means of knowledge in his power. It is otherwise if the money is intentionally paid without reference to the truth or falsehood of the fact, and with the intention that the payee shall have the money at all events. Appleton Bank *v.* McGilvray;[1] Kelly *v.* Solari;[2] Townsend *v.* Crowdy.[3] This right to recover back the money, however, will in no case be permitted to prejudice the payee who has suffered any damage or changed his situation in respect to his debtor by reason of the laches of the plaintiff, or his failure to return the check within a reasonable time.

It is plain, in the case here presented, that if the plaintiffs had paid this check at their own counter under a mistake of fact, they could have maintained this action to recover it back. Is there anything in the manner in which the payment was in fact made, or in the relation of the parties to each other as members of the Clearing House Association, which prejudicially affects this right?

It is declared by the articles, which were signed by the plaintiff and defendant banks, to be the object of the association to effect at one time and place the daily exchanges between the several associated banks, and the payment of the balances resulting from such exchanges. An early hour is fixed for making these exchanges, and a later time in the day for the receipt and payment of balances from the debtor and creditor banks. These settlements are made, not from an examination in detail of the vouchers presented, but from memoranda and tickets accompanying them. And any mistakes resulting from this mode of settlement are to be adjusted directly between the banks which are parties therein. It is further provided that "whenever checks are sent through the Clearing House which are not good, they shall be returned, by the banks receiving the same, to the banks from which they were received, as soon as it shall be found that said checks are not good; and in no case shall they be retained after one o'clock." Under

[1] 4 Gray, 520. [2] 9 M. & W. 54. [3] 8 C. B. N. S. 477.

this arrangement, the payment required of the Clearing House to a creditor bank, upon a check presented, must be regarded as only provisional until the hour of one o'clock, to become complete only in case the check is not returned at that time. And if by any mistake of fact the return of the check is not so made, then, as between the two banks, it is to be treated as a payment made under a mistake of fact, precisely to the same extent, and with the same right to reclaim, which would have existed if the payment had been made by the simple act of passing the money across the counter directly to the payee on the presentation of the check. The manifest purpose of the provision is, to fix a time at which the creditor bank may be authorized to treat the check as paid, and be able to regulate with safety its relations to other parties.

We cannot adopt the theory that a failure to present a bad check, before the time named, to the bank sending it through the Clearing House, works an absolute forfeiture, and is in itself a perfect bar to any action to recover the amount of such check. The whole arrangement, in all its provisions and declared purposes, is to be construed together. And the law will not construe any portion so as to subject parties to a penalty or forfeiture of their rights, where other reasonable interpretation can be given which will give effect and consistency to the whole. The parties have in terms affixed no penalty or forfeiture to the stipulation under consideration, and a failure to comply with its terms must leave the parties in the same position and precisely as they would stand when a payment is made under a mistake of fact in the ordinary way. After one o'clock, the defendants, upon the failure to return the check, had the right to consider it paid, and to treat it so in their dealings with others. The report finds that the delay in its return was occasioned by a mistake on the part of the messenger, a mistake which was quite as much a mistake of fact as if it had been produced by the false time of a clock which was relied on. And no suggestion is made that there has been any change of circumstances, after the time when the defendants had a right to treat the check as paid, and before it was returned, which would now subject the defendants to damage or loss, and render it unjust for the plaintiffs to recover.

We have considered the case as if the agreement required the return of the check to the bank from which it was received before or at one o'clock; but it will be noticed that the stipulation is, that the check shall in no case be *retained* after one o'clock. If it were necessary to save a penalty or a forfeiture, it might be held that the delivery of it to a messenger before one o'clock, to be returned to the bank depositing it, with sufficient time, in the absence of any accident or mistake, to reach the bank before that hour, would be a compliance with its terms, although it was not in fact delivered until some minutes after.

Judgment on the verdict for the plaintiffs.

BOYLSTON NATIONAL BANK *v.* HENRY L. RICHARDSON AND OTHERS.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, MARCH, 1869.

[*Reported in* 101 *Massachusetts Reports*, 287.]

CONTRACT for money had and received to the plaintiffs' use. Trial in the Superior Court, without a jury, before PUTNAM, J., who gave judgment for the plaintiffs, and reported the case to this court as follows: —

"The court found the following facts: On November 26, 1863, James Dennie borrowed $1000 of the defendants, and gave them therefor a check" in the usual form, drawn by himself on the plaintiffs' bank for that sum, dated November 25, 1863, and payable to the bearer. "It was agreed between the parties at that time, that the check was not to be deposited immediately, but that the defendants should let Dennie know a day or two before they wanted the money. About ten days afterwards, the defendants notified Dennie that they should want the money on the next day, and should deposit the check; to which Dennie replied that there were no funds in the bank to meet it, but that he would see them again about it in a few days. No mention was made about the check by either party after that time, nor was any demand made on Dennie for the payment of it.

"On Saturday, December 30, 1865, the defendants, without the knowledge of Dennie, deposited the check in the ordinary way in the Atlas Bank, with which they did business, together with other checks and cash, amounting in all to the sum of $5530.74, and this amount was, on the same day, entered to their credit in their account as kept on the books of that bank; but, by a usage known to the defendants, they were not entitled to draw out the amount of the check until after one o'clock on the Monday following, and not then unless it was collected by the Atlas Bank of the Boylston Bank in settlement through the Clearing House.

"On Monday, January 1, 1866, the messenger of the Atlas Bank, in accordance with the usual course of business among Boston banks and with the rules of the Clearing House Association, of which both banks were members, took the check to the Clearing House for collection in the ordinary way, and there delivered it to the messenger of the Boylston Bank, who carried it to the bank and handed it to the paying teller, whose duty it was to receive it; which teller, supposing that Dennie had sufficient funds to meet it, passed it to the bookkeeper as good, and he entered it on his books to the account of Dennie. All this was done in accordance with the usual course of business at the bank in such case. Dennie at that time had not in fact the funds to meet the check, which fact was overlooked

or not noticed by the teller. A copy of Dennie's account with the bank at that time was as follows: —

Dr.	Boylston National Bank in acc't with James Dennie.		Cr.
Bal. Oct. 2, 1865	$122.28	Oct. 23, 1865	$881.45
" 23, "	870	Nov. 18, "	146.16
Nov. 17, "	500	" 23, "	25
Dec. 29, "	125	" 30, "	314.67
		Dec. 1, "	31
Bal. overdrawn	796	" 19, "	15
		Jan. 1, 1866	1000
	$2413.28		$2413.28

"It is a usage among the Boston banks, and a rule of the Clearing House, that, if a check passed through that House to the bank on which it is drawn is not good, it shall be returned to the bank from which it came, on or before one o'clock of the same day, otherwise no claim can be made upon that bank for the amount of the check. No notice was given to the Atlas Bank in conformity with this rule; the fact of the overdraft not being discovered until after that hour. On the Wednesday following, the paying teller of the Boylston Bank, having discovered that the check was not good, took it to the defendants, told them it was not good, that Dennie had no funds at the bank to meet it at the time they received it, and demanded of them the return of the money, which they declined to pay. It is a custom of the banks not to pay checks unless the whole amount of the check is on deposit at the time it is presented.

"Upon the foregoing facts, I find that the money was paid by the plaintiffs by mistake, and that they are entitled to recover back the amount, with interest, and order judgment for the plaintiffs for that sum; to which finding the defendants except."

W. Gaston and *G. Morrill* for the plaintiffs.

T. K. Lothrop and *R. R. Bishop*, for the defendants, were stopped by the court.

Wells, J. The plaintiffs and defendants were principals in the transaction out of which this suit arises. The agency of the Atlas Bank does not affect their relations, or their rights and obligations towards each other. The Clearing House regulations do not preclude recovery. They may bear upon the question of laches as a question of fact, but are not conclusive upon that question. Merchants' National Bank *v.* National Eagle Bank.[1]

Money paid under mistake of fact may be recovered back, if there has been no laches, and the situation of the other party remains unchanged. What constitutes such a mistake of facts as will entitle a party to recover is a question of law. The court below found generally that "the money was paid by the plaintiff by mistake," and that the plaintiff was

[1] 101 Mass. 281.

entitled to recover the whole amount of the check. The report does not indicate whether the mistake upon which judgment was rendered related to the character of the check, or to the condition of Dennie's account at the plaintiffs' bank. The finding of the court is therefore not conclusive of the facts, in either aspect, except so far as they are stated in the report.

1. As to the character of the check; in form it was adapted to the use that was made of it. It contained nothing to restrict its use in that mode. The parol agreement, giving it full effect according to the terms stated, does not appear to the court to restrict the check from its ordinary use as a check. It provided only that its use should be delayed, and that there should be notice to Dennie a day or two before they wanted the money; in both of which respects the agreement was complied with. Its deposit afterwards in no way contravened the agreement under which it was received. The Boylston Bank paid it rightfully, and Dennie cannot complain of its use by the defendants, or its payment by the plaintiffs. The payment may have been contrary to Dennie's intention, and in that sense a mistake; but it was not a mistake of any fact which disentitled the defendants to receive the money in that mode.

2. The only mistake in regard to the state of Dennie's account appears to be, that the amount on deposit was not sufficient. It does not appear that the plaintiffs' teller was misled in any way, or had any reason to suppose that the account was otherwise than it was. No considerable amount had recently been withdrawn. The amount to Dennie's credit had not been reduced during the preceding month. No expected credit had failed to be received. It was simply that the teller saw fit to pay the check without taking the precaution to inform himself of the state of the account. We see nothing in the transaction which bears the character of a mistake of facts, in a legal sense, but only that of laches.

If there are any facts, not stated in the report, which led the mind of the judge, who heard the case, to the conclusion at which he arrived, they will avail upon another hearing. But upon this statement we think the judgment cannot be supported.

Exceptions sustained.

JOHN C. SOUTHWICK, RESPONDENT, *v.* THE FIRST NATIONAL BANK OF MEMPHIS, APPELLANT.

IN THE COURT OF APPEALS OF NEW YORK, MARCH 8, 1881.

[*Reported in* 84 *New York Reports*, 420.]

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, in favor of plaintiff, entered upon an order

made the first Monday of January, 1880, overruling defendant's exceptions, and directing judgment upon a verdict.[1]

The nature of the action and the material facts are set forth in the opinion.

Francis C. Barlow for appellant.

John E. Burrill for respondent.

EARL, J. The defendant claims that the plaintiff failed upon the trial to establish by proof the cause of action alleged in his complaint. To determine whether this claim is well founded, we will first see what facts were proved, and thus ascertain for what cause of action the recovery was had, and then see if such cause of action is fairly embraced within the facts alleged in the complaint.

The material facts, as proved, are as follows: Southwick, Thayer & Co. were a firm doing business in Memphis, Tenn., and J. N. Merriam & Son were a firm doing business in Boston. On the 13th day of March, 1873, George H. Thayer, a member of the Memphis firm, drew a draft upon that firm, which was accepted by them, for $2500, payable in Memphis in forty days, to the order of the Boston firm. The latter firm indorsed the draft to F. P. Merriam, who became the owner and holder thereof, and he sent the draft to Memphis for collection. Shortly prior to the maturity of that draft A. N. Merriam, of the Boston firm, being at Memphis, was notified by the Memphis firm that probably they would not be able to pay the draft at maturity, and was asked if, in that case, they might draw on the Boston firm a new draft, the proceeds of which should be used to take up the old draft. This request was assented to on condition that they should not draw the new draft without special authority. Early in May the Memphis firm notified the Boston firm that they would not be able to take up the old draft, and requested permission to draw. Whereupon, on the fifth day of May, the Boston firm sent them a telegram, as follows: "You may draw upon us at sight for $2500, to pay draft in our favor." On the next day the Memphis firm drew upon the Boston firm a sight draft for $2500, payable to their own order and indorsed by them; and their bookkeeper, Wiggs, on their behalf, took it to the defendant's bank, with which they had had previous dealings and an account, and asked defendant's cashier if he would discount it and let his firm check out the proceeds. This the cashier refused, but he said he would take the draft and place it to the credit of the drawers on over checks owing by them to the bank. Wiggs then consulted the drawers, and on the same day, with their assent, delivered the draft to the bank to be discounted, the proceeds to be credited to them in account, and they were thus credited. At that time the drawers were indebted to the bank in a much larger sum than the amount of the draft. The bank had no knowledge of the telegram authorizing the drawing of the draft, or of the purpose for which the drawers were author-

[1] Reported in 20 Hun, 349.

ized to draw. The bank thus became a *bona fide* holder of the draft for value, but not for value parted with at the time. Several days subsequently the Memphis firm drew a check on the defendant to pay the old draft, and it refused to pay the check, on the ground that their account was not then good.

After receiving the new draft and crediting its proceeds to the account of the drawers, the defendant sent it to its corresponding bank in Boston for collection. That bank presented it to the drawees for acceptance and payment, and it was accepted May 10th and paid May 13th, and the proceeds were credited by the Boston bank to the defendant, and were by it subsequently checked out in the course of its business.

The Memphis firm was not, at the time of the negotiation of the new draft, known to be insolvent, but they became openly insolvent in the latter part of June or the fore part of July, 1873, and were subsequently put into bankruptcy. This suit was not commenced earlier than the 29th day of July. At the latter date the Boston firm and F. P. Merriam assigned all their claims against the defendant to the plaintiff.

Upon these facts the court directed a verdict for the plaintiff, and its decision was probably based upon the theory that the defendant could be charged with a wrongful conversion of the draft, or upon the theory that the drawees paid the draft under a mistake of facts. In the opinion pronounced at the General Term, the judgment entered upon the verdict was sustained upon the latter theory, and the learned counsel for the plaintiff, in his argument before us, attempted to sustain it upon both theories.

It is entirely clear that no cause of action for a conversion of the draft, or to recover back money paid by mistake, is alleged in the complaint. On the contrary, the facts alleged show that there was no wrongful conversion of the draft, and that the money was paid under no mistake of any existing facts, and no mistake is in any way alleged or to be inferred from the language used.

The complaint first alleges the making of the old draft, and that the same was owned and held by F. P. Merriam; that it had matured and become payable and had been forwarded to Memphis for collection; that the Boston firm authorized the new draft to be drawn upon them in order to provide funds necessary to pay the old draft, and agreed to pay such draft upon condition that the proceeds should be used for that purpose only; that the new draft was thereupon drawn and delivered to the defendant, which was notified of the object and purpose for which the draft was authorized to be drawn, and for which the same was drawn, and that it received the draft and undertook and agreed to collect the same for the purpose aforesaid, and that the proceeds thereof, when collected, should be applied to the payment thereof; that the draft was accepted and paid for the object and purpose and upon the condition aforesaid, but that the defendant neglected and refused to apply the amount paid upon the old

draft, although requested so to do; that the draft remains unpaid and that J. N. Merriam & Co. and F. P. Merriam have sold and transferred the same and the moneys paid thereon to the plaintiff, together with all claim and cause of action against the defendant upon or by reason thereof, or by reason of the premises and the matters before alleged; and judgment is demanded for $2500, and interest from May 6, 1873.

It is thus seen that the only cause of action alleged in the complaint is based upon the promise of the defendant to take the draft, collect it, and apply the proceeds upon the old draft. This is plainly and explicitly set out. The proof entirely failed to establish such a cause of action, and the objection that it did so fail was plainly and pointedly, several times, taken at the trial.

The Code requires that the complaint must contain a plain and concise statement of the facts constituting the cause of action, and that the pleadings must be liberally construed with a view to substantial justice between the parties; and in section 723 ample power is conferred upon the court to amend pleadings at any stage of the action, and where the amendment does not change substantially the claim or defence, to conform the pleadings to the facts proved. Here, although the defect in the complaint was pointed out in due time upon the trial, no amendment was asked for or ordered. This is not a case where the pleadings can after the trial be conformed to the proof, as such an amendment would change substantially the claim of the plaintiff as alleged. This is not a case of mere variance or mere defect, but a case of failure to prove the cause of action alleged in its entire scope. Pleadings and a distinct issue are essential in every system of jurisprudence, and there can be no orderly administration of justice without them. If a party can allege one cause of action and then recover upon another, his complaint will serve no useful purpose, but rather to ensnare and mislead his adversary. Here the defendant was brought into court to answer a complaint that he had violated his promise to apply the proceeds of the draft, and he took issue upon the alleged promise, and when he came to trial he was held liable, not for any breach of promise but for the money paid by the Boston firm on the ground of a conversion of the draft, or the mistake of facts which induced the payment of the money. The cause of action alleged was one held by the plaintiff, as assignee of F. P. Merriam, for the breach of the promise to pay the old draft owned by him. The cause of action for which the recovery was had was one which the plaintiff held as assignee of J. N. Merriam & Co., for the recovery of the money paid by them upon the new draft.

It is no answer to this objection that the defendant was probably not misled in its defence. A defendant may learn outside of the complaint what he is sued for, and thus may be ready to meet plaintiff's claim upon the trial. He may even know precisely what he is sued for when the summons alone is served upon him. Yet it is his right to have a complaint, to

learn from that what he is sued for, and to insist that that shall state the cause of action which he is called upon to answer, and when a plaintiff fails to establish the cause of action alleged the defendant is not to be deprived of his objection to a recovery by any assumption or upon any speculation that he has not been injured.

But passing this point the defendant further contends that the plaintiff ought to have proved a demand upon it for the draft, or the money paid thereon, before commencement of the suit; but that he failed to prove such demand.

It is not disputed by the plaintiff that such a demand was necessary unless it was in some way waived by the defendant, or unless it was in some way estopped from insisting upon a demand. Whether the action be treated as one for the conversion of the draft, or of the money paid thereon, or for the recovery of money paid by mistake, a demand was a prerequisite to the maintenance of the action against the defendant, who lawfully and innocently received the draft and the money paid thereon. The obligation of a party to refund money voluntarily paid by mistake can arise only after the notification of the mistake and a demand of payment. Powers *v.* Bassford;[1] Sluyter *v.* Williams;[2] Stephens *v.* Board of Education;[3] Stacy *v.* Graham;[4] Freeman *v.* Jeffries.[5]

Here the requisite demand was not only not proved, but was not alleged in the complaint. The only demand alleged was a request to apply the proceeds of the new draft upon the old one in pursuance of the alleged promise of the defendant. No demand to pay the money to the plaintiff or his assignors is alleged, and none was proved to have been made before the commencement of the action. There was no proof that, before the commencement of the action, defendant had any knowledge of the telegram of May 6th, or of the purpose for which the drawers were authorized to draw the new draft, or of any claim that the drawees had paid the draft under any mistake, or that they claimed that the money paid should be refunded to them. There is no proof even that it had any knowledge that the draft or its proceeds had been improperly diverted. It is shown that it refused to pay a check drawn to take up the old draft and declined to pay that draft when presented, but it is not shown that they were, at the time when the check and draft were presented for payment, or at any other time before the commencement of the suit, informed of the circumstances now relied upon by the plaintiff, connecting that draft with the new one.

The plaintiff, at the trial, attempted to show a demand or an excuse for not making one by two letters, and unless such demand or excuse is found in these letters, it is not found in the case. The first letter is dated May 13, 1873, and was addressed by the Boston firm to W. W. Thacher, cashier of the defendant at Memphis. It is as follows:—

[1] 19 How. Pr. 309. [2] 37 How. Pr. 109. [3] 3 Hun, 712.
[4] 14 N. Y. 492. [5] L. R. 4 Ex. 189, 200, 201.

SIR — We are much surprised at the communication we have received this day from S. T. & Co., relating to the position you have taken about the draft on us, viz. : not honoring their checks and allowing them to pay their draft in our favor.

You had our explicit authority to draw on us (purpose specified also), and you have never yet had occasion rightly to doubt our honor and ability to pay all we contracted to, to the utmost farthing. We, of course, recognize your right to decline to cash their draft; that must be as your own judgment dictates. But to obtain their obligations and retain the funds for two weeks, thus putting us to annoyance and inconvenience without just cause, is not in accord with our New England ideas of honorable business dealing. All through this unfortunate affair we have tried to act toward you in a perfectly frank and honorable manner. We showed our hand to Mr. Davis, and offered him every thing we could and certainly don't "back water" now; but we can't submit to transactions of this kind. We would like to hear why you seem to have lost confidence in us. By letting S. T. & Co. pay our draft you don't hurt your case.

Answer. Yours, etc.,

J. M. MERRIAM & SON.

Here is no intimation that the new draft or the money paid thereon had been diverted or wrongfully converted, and there is no notice of any mistake inducing the payment of the draft, and no demand of any kind.

To this letter Thacher replied under date of May 20, as follows : —

GENTLEMEN — Your favor of the 13th is before me and I do not exactly understand it.

Messrs. S. T. & Co. were overdrawn on our books, say $6800; they deposited with me a sight draft on you for $2500, which was placed to their credit, and they were informed at the time that no check would be allowed against it, but it must go to reduce their overdraft. I had no intention of taking the draft, except to reduce their account.

If you understand the transaction different, I would be pleased to hear from you and we will compare notes regarding it.

Respectfully,

W. W. THACHER, *Cashier.*

This was a perfectly frank and fair letter, explaining the situation, saying that he did not exactly understand the prior letter, which was certainly obscure and confusing, and asking for information in case the writers of the prior letter understood the facts differently from what he stated them. This letter contained no refusal to comply with any demand if one had been made, and no position was taken therein which excused a demand, or precluded the defendant from insisting upon one. This, so far as appears, ended the correspondence between the parties, and the suit followed. It

matters not that it is quite probable that the defendant would not have complied with a demand if one had been made, for that does not dispense with the necessity of making one. When a demand is necessary it is not excused by showing that the defendant would not probably have complied if one had been made. And it matters not that the defendant has, upon the trial, contested the plaintiff's right to recover. That has occurred since the commencement of the action, and the plaintiff's right of action must have been perfect when the suit was commenced.

The objection that no demand was made was distinctly taken on the trial, when the plaintiff offered in evidence the first letter, and in defendant's motion to nonsuit the plaintiff at the close of plaintiff's evidence, and again at the close of all the evidence.

We are therefore of opinion that the point we have just considered was well taken. But upon the assumption that the complaint is sufficient and that a proper demand was made we are of opinion that the facts proved did not warrant the verdict ordered.

Here there was no conversion of the draft by the defendant. It was delivered to it by the only persons at the time liable thereon. If the telegram of the drawees be regarded as an unconditional promise in writing to accept the draft it did not bind them as acceptors because the defendant did not receive the draft "upon the faith" of the telegram. 1 R. S. 769, § 8; Greele *v.* Parker;[1] Bank of Michigan *v.* Ely;[2] Barney *v.* Worthington;[3] Johnson *v.* Clark.[4] After the defendant received the draft from the drawers it could hold it against them as drawers and indorsers thereof, and no one could control their dominion over it. The drawees could not have then sued it for the conversion or for the possession of the draft, or to restrain any use which it might choose to make of it. After the defendant obtained the draft all it did with it was to present it for acceptance and payment to the drawees, and after payment it delivered the draft, as we must presume, to them. It thus parted with the possession of the draft to them, and there was no wrongful conversion of it of which they could complain. And so this case is unlike the case of Comstock *v.* Hier,[5] which is very much relied on by the learned counsel for the plaintiff. In that case Comstock was the indorser of the note which it was claimed Hier had wrongfully converted, and it was held that Comstock was in such relation to the note that he could sue for a wrongful conversion thereof, or for the proceeds received upon the wrongful conversion thereof. The recovery was there upheld on the theory of a wrongful conversion of the note. But this recovery cannot be upheld upon that theory.

The only other theory suggested for the maintenance of this action is that of mistake, and much can be plausibly and forcibly said in favor of this theory. It is certainly true that if the drawees had known what they

[1] 5 Wend. 414. 17 Wend. 508. [3] 37 N. Y. 112.
[4] 39 N. Y. 216. [5] 73 N. Y. 269.

now know, or if they had known that the proceeds of the draft were to be applied otherwise than upon the old draft, they would not have accepted or paid the draft. But were they so mistaken that they can reclaim the money voluntarily paid by them? It is not every mistake that will lay the groundwork for relief. It must be a mistake as to some existing fact, not as to something to happen or to be done in the future. It must be a mistake as to some fact not remotely, but directly, bearing upon the act against which relief is sought. Dambmann *v.* Schulting.[1] If it were the rule to relieve against mistakes as to remote or what are sometimes called extrinsic facts, great uncertainty and confusion would attend business transactions. Here the draft was genuine, addressed to the drawees, who had authorized it to be drawn, and it was held by the defendant, which could lawfully receive payment thereof. There was no mistake as to the intrinsic facts. The facts that the drawers had not acted in good faith with the drawees, or had placed the draft and its proceeds beyond their control, so that the old draft might not be paid, were too remote. The mistake of the drawees was rather as to the application of the money paid by them — a future fact. If the defendant had received this money and applied it upon the old draft the precise expectation of the drawees would have been met and there would have been no ground of complaint. It is believed that no case can be found which holds that a party paying money, under the circumstances existing here, has been allowed to reclaim it upon the ground of mistake. The defendant's case may rest upon principles decided in the cases of Justh *v.* The National Bank of the Commonwealth,[2] and Stephens *v.* The Board of Education.[3] In the Justh case one Gray borrowed plaintiff's checks for $40,000 upon forged collaterals. He took the checks and had them certified to be good by the drawee bank, and then deposited them with the defendant, which received the money upon them. In that case the plaintiffs clearly parted with their checks under a mistake as to the genuineness of the collaterals. If they had known that they were forgeries they would not have parted with the checks. But upon the assumption that the defendant had parted with no value for the checks, or upon the faith of the checks, this court held that the plaintiffs could not recover the amount of the checks, treating them as money paid to the defendant. The decision was also put upon the ground that the defendant had parted with value for the checks, and thus rests upon both grounds. In the Stephens case one Gill obtained of the plaintiff a sum of money upon the security of a forged mortgage, and paid the money to the defendant upon an antecedent debt; and it was held that the plaintiff could not reclaim the money. These decisions and others like them do not rest, as has been sometimes supposed, on the ground that money has no earmark, but upon grounds of public policy. As said by Judge ANDREWS in the Stephens case: "It would introduce great confusion into commercial deal-

[1] 75 N. Y. 55. [2] 56 N. Y. 478. [3] 79 N. Y. 183.

ings, if the creditor who receives money in payment of a debt is subject to the risk of accounting therefor to a third person who may be able to show that the debtor obtained it from him by felony or fraud," and if the plaintiff in that case had shown that the very money he had loaned to Gill had been delivered to the defendant, the decision must have been the same. In the case of Gammon *v.* Butler [1] the plaintiff gave her husband $100 in bills, to be by him carried and delivered to her children, and he paid the same money to the defendant upon an antecedent debt, and it was held that, in an action for money had and received, she could not recover, and the decision was based upon the same principles laid down in the cases of Justh and Stephens. A large share of the business of the world is carried on by means of bills of exchange drawn upon persons liable to pay or for the accommodation of the drawers willing to pay them. They pass from hand to hand by indorsement or mere delivery, and are generally payable at places distant from the places where they are drawn. The "protection and encouragement of trade and commerce," as said in the Maine case, and "considerations of public policy and convenience," and "the security and certainty in business transactions," as said in the Stephens case, require that when such a bill is paid to one who holds it in good faith and for value, he should not be called upon afterward to account for the money paid, perhaps, at a distant time or place after the accounts with the drawers have been settled and closed, upon proof that in transactions between the drawees and drawers, of which the holder has no knowledge or means of knowledge, there has been some fraud, or wrong, or mistake to the injury of the drawees. If this money can be reclaimed, public policy is just as much contravened as it would be if the money had been drawn from the drawees by the drawers and by them paid to the defendant. If the drawers had received this money from the drawees to pay the old draft and had used it to pay their antecedent debt to the defendant, it is conceded that the drawees could not have reclaimed it. How can it make any difference in principle that the money was paid to the defendant directly by the drawees upon the order of the drawers? Whether the money was paid in the one way or the other, the principles of public policy and convenience lead to the same conclusion.

It matters not that the defendant, not being a holder for value parted with when it took the draft, could not have enforced it against the drawees even after acceptance. That was true in the case of the check in the Justh case. If the defendant in that case had parted with no value at the time it took the checks from Gray, it could not have sued the plaintiffs there as drawers. Yet after the plaintiffs, through the drawee bank, had paid the checks, it could not reclaim the money paid. Here the drawees could have refused to accept the draft, and they might have refused to pay after acceptance, and might probably have successfully defended an action upon

[1] 48 Me. 344.

the draft. But having paid the draft, they must now look to the drawers who made an improper use of the same, and who in law perpetrated a fraud upon them, and they cannot visit the consequences of that fraud upon the innocent defendant.

It is undoubtedly the rule in this State that one who signs commercial paper for the accommodation of another, for a particular purpose, can defend, when sued upon the paper by a person who took it as security for, or to apply upon an antecedent debt without parting with value at the time, by showing that the paper has been diverted from the purpose intended. This rule is an exception from the general rule of commercial law which protects one taking such paper in good faith and for value against the equities or defences of all prior parties to the paper.[1] While this exception has been much assailed in other jurisdictions and is not recognized in England, or in the Federal courts, or in the courts of many of the States of the Union, it is believed that it more frequently than otherwise tends to just results. The holder of the paper in such cases is generally soon made aware of the defence, and can take measures to protect himself from harm. But it is carrying the exception one step further to hold that the accommodation signer of such paper can pay it, and then, at any time before the statute of limitations has barred his right, and after time has complicated or changed the relations of the parties, sue to recover back the money thus paid.

The facts seem to disclose another ground of defence to this action. The draft was of value to the defendant. It had the right in any event to hold it and enforce it against the drawers, and the drawees could not reclaim the money paid and at the same time retain the draft. They should, before the commencement of the action, have demanded the money, and tendered back the draft, and it is possible that a tender at the trial would be sufficient. As this point was not made on behalf of the defendant, we will notice it no further and give it no weight in our decision.

In this discussion we have assumed that the defendant took this draft without notice of the purpose for which the drawees authorized it to be drawn. We are justified in this assumption by the undisputed evidence. If the case had been submitted to the jury, and they had found that the defendant had such notice, the verdict would have been so far against the evidence that it would have been the duty of the court, upon application, to set it aside.

Our conclusion, therefore, is that this recovery cannot be upheld, and the judgment should be reversed and a new trial granted.

All concur, except MILLER, J., dissenting; FOLGER, C. J., and ANDREWS, J., concurring in result.

Judgment reversed.

[1] 1 Par. N. & B. 218.

MERCHANTS' NATIONAL BANK *v.* NATIONAL BANK OF THE COMMONWEALTH.

In the Supreme Judicial Court of Massachusetts, June 23, 1885.

[*Reported in* 139 *Massachusetts Reports*, 513.]

Contract to recover $15,000, the amount of a check, dated September 3, 1883, drawn on the plaintiff by Benjamin F. Burgess & Sons, in favor of the Massachusetts Loan and Trust Company, and by it deposited, on September 3, with the defendant. Trial in this court, before C. Allen, J., who reported the case for the consideration of the full court, in substance as follows: —

The plaintiff and defendant banks are members of an unincorporated association called the Boston Clearing House Association, whose rules and course of business are the same as set forth in the cases of Merchants' Bank *v.* Eagle Bank,[1] and Exchange Bank *v.* Bank of North America,[2] to which reference is to be made.

Benjamin F. Burgess & Sons were depositors with the plaintiff bank and kept a bank account with it, and Benjamin F. Burgess was one of the plaintiff's directors. They were indebted to the plaintiff in the sum of $83,000 on three notes, payable on demand, with a pledge of warehouse receipts for 1270 hogsheads of sugar as collateral security, and in the further sum of $129,500 on three other notes, payable on demand, with a pledge of United States bonds and other securities as collateral. Demand was made for the payment of the notes for $83,000 on the 23d or 24th of August, 1883, and, within two days after the demand, Burgess told the plaintiff's president that he had sold or bargained to sell 217 hogsheads of the sugar; and the warehouse receipts were thereupon entrusted to Burgess, as agent of the bank, to enable him to deliver the sugar so sold, with the understanding that the money received for the sugar should be brought to the bank and applied on the debt. The sugar was sold on August 23, to Nash, Spaulding & Co., who gave their check for $7500, dated September 1, and payable to Benjamin F. Burgess & Sons. This check was deposited with the plaintiff by that firm, on September 1, to the credit of Benjamin F. Burgess & Sons, and the same was entered to their credit in their bank account, the plaintiff not knowing at the time, nor until September 5, that it came from the sale of the sugar. Prior to that time, when Burgess & Sons had been allowed to dispose of goods pledged by them as collateral security to the plaintiff bank, they had usually deposited the money or check received upon the sale thereof, and then given their own check for the same amount to pay to the bank the amount received from the sale of

[1] 101 Mass. 281. [2] 132 Mass. 147.

the collateral security. There was no evidence of any prior instance in which they had failed, in this or in some other way, to return to the bank the proceeds of such sale, to be applied upon the debt.

On the morning of September 4, there was an apparent balance of $17,145.56 to the credit of the firm of Burgess & Sons, the item of $7500 being included as an item to their credit, entered on September 1, as above stated. During the forenoon of September 4, three checks of Benjamin F. Burgess & Sons, of $1000, $225, and $200, respectively, were paid over the counter by the plaintiff. On the same day the check in controversy in this action came from the defendant bank to the plaintiff bank through the Clearing House, where it had been provisionally paid, in accordance with the usual course of business in the Clearing House. This check was received by the plaintiff at about noon, and was in the first instance entered to the debit of Benjamin F. Burgess & Sons on the plaintiff's books; but at about one o'clock the president of the plaintiff received the following communication, signed by the agent of J. S. Morgan & Co.: — "Please take notice that any and all property and merchandise in your hands, pledged to you by Benjamin Burgess & Sons, and the proceeds of any such property and merchandise, is, and the same are, so far as not required for the purposes of such pledge, the property of, and must be accounted for, and paid over to, J. S. Morgan & Co." This led the president to think that Burgess & Sons were in financial trouble, and he then discovered that no payment from the avails of the sugar had been made upon the indebtedness for which the sugar had been pledged as collateral security. He looked at the condition of their bank account, and immediately gave directions to send back the check of $15,000 to the defendant, and to demand the repayment of the money, as the check was not good; and the entry of it in the account of Burgess & Sons was erased. At the same time, by the direction of the president, there was debited to the account of Burgess & Sons $29,500, which was the amount of one of the notes held by the plaintiff bank against them, for which other collateral was held as security, and this was afterwards, on the same day, corrected by substituting $23,000, the balance of one of the notes for which the sugar was held as collateral, upon which demand had been made. The messenger started from the Merchants' Bank with the check at two or three minutes after one o'clock, and demand was accordingly made upon the defendant at from seven to twelve minutes after one o'clock, on September 4, on the ground that the check was not good; and repayment was refused. The defendant had entered the check of $15,000 to the credit of the Massachusetts Loan and Trust Company on the day of its deposit, and the defendant did not change its position towards said company in the interval between one o'clock and the time when the plaintiff's demand was made as aforesaid.

Where there is not enough money on deposit to pay a check in full, the ordinary custom is to return the check as not good.

The plaintiff held no surplus of security upon either branch of the indebtedness of Burgess & Sons which could be applied to make good the $7500. The president of the plaintiff bank, who was the only principal officer testifying, and who gave the directions for the return of the check, had no knowledge on September 4 that the sugar pledged as collateral security was not sufficient to secure all of the notes of Burgess & Sons held by the bank for which the collateral was given.

Burgess & Sons borrowed from the plaintiff upon memorandum checks, $2000 on August 29, and $6000 on August 31, which sums were placed to their credit on those respective dates, Burgess handed the checks of his firm for these amounts to the teller of the plaintiff bank, asking that his firm might be credited with the amounts thereof, and the checks "held over and charged in the next day." These checks were not at the time entered in the account upon the plaintiff's books to the debit of Burgess & Sons, but were merely kept in the drawer as memorandum checks. Burgess was desirous of getting this transaction out of the books of the bank.

On September 1, after making the deposit of $7500 received from the sale of the sugar, Burgess directed the teller to charge the two memorandum checks in the account, which was accordingly done, and these two charges are shown by the items of $6000 and $2000 in the statement of account as checks charged on that day. In this way he returned and repaid the money credited in the two checks to Burgess & Sons. Burgess & Sons were not entitled to the credit obtained on September 1 by the deposit of the check for $7500.

The defendant contended that the remedy of the plaintiff, if any, was not against the defendant, but against the Massachusetts Loan and Trust Company; that the plaintiff got the benefit of the sale of the sugar by applying the proceeds on another loan; and that for the above reason, and also in any view of the case, there was no such mistake of fact as would entitle it to recover.

S. Bartlett and *R. D. Smith* for the plaintiff.

H. D. Hyde and *S. Lincoln* for the defendant.

DEVENS, J. The rules and course of business of the unincorporated association called the Boston Clearing House Association have been so set forth in the recent decisions of this court that they do not require to be here fully restated. They were adopted solely for the purpose of facilitating exchanges and the adjustment of accounts between the banks. By a contract between them, an association is formed, which is their common banker. To this association each bank, which is indebted by reason that more checks, etc., are presented, as drawn upon it, than it presents, as drawn against the other banks who are members, pays the balance found due from it to the association, while each bank that shows a balance in its favor receives from the association the amount by its check. Mistakes that may be made in this computation, because checks are not good, are not settled by the

association, but between the banks themselves; and such checks are to be returned by the banks receiving the same to the banks from which they are received as soon as it shall be found that they are not good, "and in no case are they to be retained after one o'clock." To the regulations of this association, the customers of the banks are not parties, and, whatsoever effect is to be given to them as between the banks, their customers are not in a situation to claim the benefit of them, nor are they liable to be injuriously affected by them. Merchants' Bank *v.* Eagle Bank;[1] Bank of North America *v.* Bangs;[2] Manufacturers' Bank *v.* Thompson;[3] Exchange Bank *v.* Bank of North America.[4] By these regulations, it was, in substance, agreed in the case at bar, that, if Burgess & Sons had to their credit a sum sufficient to meet the check for which they were entitled to draw, the amount of which is here demanded, the provisional allowance of it at the Clearing House should stand; but that, if it appeared on investigation that they were not entitled to draw for any such sum, the check should not be retained by the plaintiff bank after one o'clock. The bank which had sent the check to the Clearing House would then be notified that it was not good, and that repayment of the amount of it would be expected by the bank on which it was drawn.

The check was not returned to the defendant bank until after one o'clock. It is not disputed by the plaintiff, that if, in consequence of this, the defendant had changed its position, as if it had paid over the amount of the check to the owner, who had deposited it with the bank for collection, the bank should not suffer; but it contends that when, by a mistake as to a matter of fact, it has delayed the return of the check until after one o'clock, this cannot be taken advantage of by the bank on behalf of the owner of the check, there having been no change in its position in the interval between one o'clock and the actual return of the check.

The case of Merchants' Bank *v.* Eagle Bank,[1] goes far to decide the case at bar. It was there held that the manifest purpose of the provision in the Clearing House rules was to fix a time at which the creditor bank was authorized to treat the check as paid, and so deal with it in its relations with others. The court declined to adopt the theory that a failure to return a bad check before one o'clock to the bank sending it through the Clearing House would work a forfeiture of the right to return it, or, of itself, constitute a bar to an action to recover its amount; and held that a failure to comply with the stipulation as to returning the check would leave the parties in the same position as when a payment is made under a mistake of fact in the ordinary way. This case has been since cited with approval. Manufacturers' Bank *v.* Thompson,[3] and Exchange Bank *v.* Bank of North America.[4]

In Preston *v.* Canadian Bank of Commerce,[5] it was held otherwise, and

[1] 101 Mass. 281. [2] 106 Mass. 441. [3] 129 Mass. 438.
[4] 132 Mass. 147. [5] 23 Fed. Rep. 179.

there decided that a mistake discovered after half-past one o'clock, which was there the hour for returning checks, could not be corrected by the bank making it, nor the check then returned. It is said by Judge BRADLEY, referring to the case of Merchants' Bank *v.* Eagle Bank,[1] "The Massachusetts court puts its decision on the ground that you may correct a mistake of this kind at any time after it is discovered, if it places the party to whom the check is returned in no worse condition than it would have been in if it had been returned within the stipulated time; thus overlooking the rule that parties may agree that they shall not have the right to correct mistakes unless done within a limited time." But we have not overlooked the right of parties to make such agreement as they choose. The question is as to the interpretation of the rule which they, as members of the Clearing House, have adopted. The rule is, "Whenever checks which are not good are sent through the Clearing House, they shall be returned by the banks receiving the same to the banks from which they were received as soon as it shall be found that said checks are not good: and in no case shall they be retained after one o'clock." If it were intended that mistakes should never be corrected unless discovered by one o'clock, this should in terms explicitly appear. As it does not, it seems to us the more correct interpretation to hold that the rule authorizes the bank receiving the check, after one o'clock arrives and the check is not returned, to treat it in all transactions as if it were good. If, therefore, the bank changes its position, it will suffer no loss by reason of it. On the other hand, if the mistake is discovered after one o'clock, and the bank receiving the check has not changed its position by reason of the expiration of the time, it should rectify the mistake when reasonable care has been exercised by the bank on which it was drawn.

The defendant also relies much on the case of Merchants' Ins. Co. *v.* Abbott,[2] as establishing a somewhat different principle from the case of Merchants' Bank *v.* Eagle Bank. The latter case is not there cited, but we do not find any intention to impugn its authority. It appears to us quite distinguishable from the case here presented. Denny, Rice & Co. held a valid debt due from Abbott, whose premises had been insured by the plaintiff company, and had been destroyed by fire. Abbott assigned to Denny, Rice & Co. his claim against the plaintiff, which, at Abbott's request, paid the amount of the loss, as adjusted between itself and Abbott, to Denny, Rice & Co. There was no question of the validity or genuineness of the assignment, and, by the payment made by the plaintiff, the debt which Abbott owed Denny, Rice & Co. was discharged and satisfied, and this might have been so pleaded by Abbott had he been sued thereon. Tuckerman *v.* Sleeper.[3] A year later, the plaintiff discovered that the fire had been caused by Abbott, and that his proofs of loss were false and fraudulent, and, six months afterwards, brought an action against Abbott and Denny, Rice & Co. It was conceded that Denny, Rice & Co. had no knowledge of any fraud.

[1] 101 Mass. 281. [2] 131 Mass. 397. [3] 9 Cush. 177.

As to Abbott, it was not doubted that the plaintiff might recover. If the money had been paid to him, it could have been recovered as money paid under a mistake of fact; and the payment by the plaintiff, at his request, in discharge of his debt to Denny, Rice & Co., was equivalent to a receipt by him of so much money. But as to the other defendants, Denny, Rice & Co., the case was deemed to stand as if the money had been paid by the plaintiff to Abbott, and by Abbott to them in the ordinary course of business, in which case it could not be doubted that, while the plaintiff could recover the money from Abbott, neither Abbott nor the plaintiff could recover the amount from Denny, Rice & Co. There was not only no mistake between the plaintiff and Denny, Rice & Co., but by reason of the mistake of the plaintiff — produced by the fraud of Abbott, to which Denny, Rice & Co. had in no way contributed — they had been induced to surrender and discharge the debt which Abbott owed to them. It was impossible to restore them to their original position.

In the case at bar, there was no change of circumstances, after the time when the defendant had a right to treat the check as paid and before it was returned, which would in any way subject the defendant to loss, or render it unjust for the plaintiff to recover. The fact that the defendant gave credit to its depositor in this interval did not make the defendant liable to such depositor when a mistake was discovered which showed it to have been erroneously done.

The mistake made by the plaintiff was such as would bring the case within the rule which has heretofore been held applicable on this subject. There was no carelessness, as in Boylston National Bank *v.* Richardson,[1] where the paying teller neglected to examine the account of the drawer of a check, which account had not varied materially for a month, and which had not been sufficient to meet the check for three months, and paid it without examination. Such a transaction showed no mistake of fact, in any legal sense, but laches simply. The teller in that case was not misled in any way, and had no reason to suppose the account of the depositor was otherwise than as it actually appeared.

The mistake in the case at bar was, that the account of Burgess & Sons with the plaintiff bank was really different from that which appeared on its books, and this was effected by the wrongful act of Burgess. He had received a check for $7500 for property belonging *in specie* to the bank, which it was his duty to have delivered to the bank as its property. Instead of doing this, he deposited the check as the property of Burgess & Sons, and by that act obtained for them a credit on the books of the plaintiff bank to which they were not entitled. Against the false balance thus produced by depositing the money of the bank as if it were their own, Burgess & Sons fraudulently drew the check in controversy, and it led to the retention of the check until a few minutes after one o'clock.

[1] 101 Mass. 287.

But if money paid under a mistake of fact may be recovered, and if the credit to which the defendant was entitled at one o'clock might be recalled on discovery of such a mistake, it is urged that the plaintiff should then be able to show mistake, misapprehension, or ignorance of some definite and material fact which directly affected the obligation of the plaintiff to pay the check; and that the credit was sought to be recalled under a vague apprehension of insecurity produced by reports of the embarrassment of Burgess & Sons. This, it is contended, is not sufficient, even if subsequent investigation has shown that the apparent credit of Burgess & Sons with the plaintiff bank was fraudulently obtained in the mode above stated. It appears by the report that the president of the plaintiff bank, being led to think that Burgess & Sons were in financial trouble, then discovered that the avails of the sugar confided to Burgess to sell had not been received by the bank upon the indebtedness for which it was pledged as collateral security; and, looking at the condition of Burgess & Sons' bank account, he directed the return of the check.

But even if, at the time of the return of the check, the president could not have stated the exact way in which the mistake was made, when subsequently investigated it is shown to have arisen from the same transaction to which he then attributed it, and which caused him to direct the return of the check, namely, the sale of the sugar confided to Burgess. He supposed that the proceeds of the sugar had not been paid into the bank at all, while in fact they had been paid in, but in such a manner as to obtain, by spoken or acted falsehood, a wrongful credit in favor of Burgess & Sons.

Nor can it be seen why the plaintiff bank might not have returned the check the next day, if there had been no change in the circumstances, and if it had then discovered, as it actually did, the exact character of the mistake. It cannot affect the plaintiff unfavorably that it offered to do so earlier, and on the same day it received the check, even if its president could not then formally state the exact mode in which the mistake had occurred.

The defendant further urges, that there has been such laches on the part of the plaintiff bank in its dealings with Burgess that it is not entitled to recover. Dana *v.* Bank of the Republic.[1] On August 23 or 24, 1883, demand was made upon Burgess for payment of demand notes which were then deemed to be amply secured by sugar as collateral security. Two days after this, Burgess told the plaintiff's president that he had sold or bargained for the sale of 217 hogsheads; and the warehouse receipts were delivered to him, as agent of the bank, to enable him to transfer the sugar sold, with the understanding that the money received therefrom would be applied upon the debt for which it was held as collateral security. A check was received therefor, on September 1, of $7500, which was the one wrongfully deposited by Burgess to the credit of Burgess & Sons. The laches

[1] 132 Mass. 156.

which the defendant alleges is in failing to look after the proceeds of this sugar until September 4. But up to this time the plaintiff bank had not supposed Burgess & Sons to be in financial straits; they had always been allowed to dispose of the goods pledged by them as collateral, and had always faithfully accounted for the proceeds of the same. That no suspicions were in fact excited until September 4, is quite clear, and the circumstances are not such that we can say there has been laches on the part of the plaintiff that should deprive it of its remedy for the mistake into which it was led by Burgess's fraud.

At the trial before a single judge, the defendant contended that the remedy of the plaintiff, if any, was not against the defendant, but against the Massachusetts Loan and Trust Company; and that the plaintiff got the benefit of the sale of the sugar by applying the proceeds on another loan. Neither of these positions is tenable. Where a party who has paid money, is entitled to recall it, he may do so, provided the agent has not paid it over to the principal, and that no change has taken place in his situation which would render it unjust to him. The fact that the agent has passed the money in account with his principal, without any new credit being given to the principal, will not of itself be sufficient to enable the agent to retain it.[1]

Nor can the plaintiff obtain any benefit from the sale of the sugar by Burgess, except by this action, which, to the extent to which it is maintained, will restore to the plaintiff that which by Burgess's fraud it has been induced to pay out.

The question remains, how much the plaintiff is entitled to recover. By the course of dealing between the banks composing the Clearing House Association, when there is not enough money on deposit to pay a check in full, the ordinary custom is to return it as not good. This custom has no application to the inquiry how much the plaintiff may now recover, which is one outside of the Clearing House rules. These were not complied with by the return of the check within the time, and cannot control in determining how much shall be returned after payment of it has been made. If no mistake had been made, and the plaintiff had followed the custom, it is true that it would have refused the check entirely, and thus have kept in its control the other funds of Burgess & Sons not the subject of mistake, which it might have applied in offset to the other claims which it held against Burgess & Sons. But the defendant is not bound to indemnify the plaintiff against all the incidental consequences of its mistake, but only to return that money which was the subject of the mistake. So far as Burgess & Sons were entitled to draw, the defendant has now a right to hold. The fact that, if Burgess & Sons had overdrawn, and this had been known to the plaintiff, it would have wholly refused the check, should not deprive the defendant of that which it was the duty of the plaintiff to pay him

[1] Story on Agency, § 300.

upon a check properly drawn, when it has itself honored the check as it was actually drawn. The plaintiff bank was entitled, if it saw fit, to pay the check to the amount actually due from it to Burgess & Sons, if the defendant was willing to accept that sum. To this Burgess & Sons could have made no objection.

Nor is the plaintiff here entitled to recover any money to the use of Burgess & Sons. It would do so if it recovered the money for which Burgess & Sons had a right to draw, even if, when recovered, it would go to the use of Burgess & Sons only by the payment of their other debts or liabilities to the plaintiff bank.

The money which was the subject of the mistake was $7500. In the forenoon of September 4, and necessarily before the check of the defendant could be treated as paid, three checks, together amounting to $1425, were drawn from the deposit of Burgess & Sons, which was nominally $17,145.46. These two sums being deducted from this deposit, there remained $8220.46, for which Burgess & Sons had a right to draw. The amount which the plaintiff is entitled to recover is the difference between this sum and $15,000, with interest from the date of the writ.

Judgment accordingly.

(*c.*) *Mistake may be as to Title of Vendor.*

CRIPPS *v.* READE.

In the King's Bench, April 15, 1796.

[*Reported in* 6 *Term Reports*, 606.]

Assumpsit for money had and received to recover a sum of forty guineas, which had been paid by the plaintiff to the defendant for the purchase of a leasehold estate. The defendant claimed the estate in question as administrator to Mary Bartlett, who had taken out letters of administration to her husband, the former possessor of the estate, under the name of Caleb Bartlett, his real name being Carey Bartlett. On the sale the lease itself was delivered to the plaintiff, but there was no assignment or other conveyance from the defendant; but a conversation took place between them in which the latter said "that the premises were his right and property to do as he liked with, and if anything happened he would see the plaintiff righted." Afterwards John, the nephew of Carey Bartlett, took out administration to him by the right name, and recovered possession of the premises by ejectment.

It was contended on the part of the defendant at the trial, 1st, that no action lay to recover the purchase-money, on the authority of Bree *v.*

Holbech,[1] where, under circumstances of a similar nature the principle of *caveat emptor* was held to apply. But secondly, if any action could be maintained, it could only be on the special warranty. But LAWRENCE, J., before whom the cause was tried at the last Oxford assizes, overruled the objections, and directed a verdict to be found for the plaintiff, with liberty to the defendant to move to enter a nonsuit.

Plumer now made that motion, upon the grounds mentioned at the trial. But

The Court refused the rule.

LORD KENYON, C. J. I do not wish to disturb the rule of *caveat emptor* adopted in Bree *v.* Holbech, and in other cases where a regular conveyance was made, to which other covenants were not to be added; for in general the seller only covenants for his own acts and for those of his ancestor, in which respect the case of a mortgage differs from it, as a mortgagor covenants that at all events he has a good title; but here the whole passed by parol, and it proceeded on a misapprehension by both parties that the defendant was the legal representative of the lessee, though it turned out afterwards that he was not. As therefore the money was paid under a mistake, I think that an action for money had and received will lie to recover it back; in the case cited no action at all could have been maintained. *Rule refused.*

JOSEPH JOHNSON *v.* JOHN JOHNSON.

IN THE COMMON PLEAS, MAY 31, 1802.

[*Reported in* 3 *Bosanquet & Puller*, 162.]

ASSUMPSIT for money had and received.

The cause was tried before HEATH, J., at the summer assizes for Warwick, 1801, and the plaintiff was nonsuited. In Michaelmas term following, a rule *nisi* for setting aside the nonsuit and having a new trial was obtained; but afterwards, at the desire of the court, it was agreed that a special case should be drawn up, the material facts of which were as follows: —

William Johnson of Rugby, being possessed for the remainder of a term of 1900 years of a house and little close in Rugby, by indenture of the 22d August, 1761, in consideration of an intended marriage (afterwards solemnized) between himself and Anne Langley, assigned the above premises to John Walker and Joseph Johnson, their executors, administrators, and assigns, in trust to permit the said William Johnson to enjoy the premises for the remainder of the term if he should so long live; remainder after his death to his intended wife for her life; and after her decease upon trust to permit and suffer the heirs of the body of the said Anne Langley by the

[1] Dougl. 654.

said William Johnson lawfully begotten, to receive the rents and profits during the remainder of the term; and in default of such issue, to permit the executors, administrators, and assigns of the said William Johnson to receive and take the rents and profits during the remainder of the term. This deed also contained a power of revocation to William Johnson and Anne Langley during their joint lives. William Johnson by will, dated the 12th December, 1732, devised as follows: "*Item*, I do hereby ratify and confirm the settlement of my house in Rugby, wherein I now live, with the close and appurtenances thereto belonging, made on my marriage with my present wife; and subject to such uses as are contained in the said settlement, I do give and bequeath all my reversion, remainder, and interest in the same premises unto Edward Boddington, Thomas Walker, Joseph Johnson (the plaintiff), and Philip Williams, and to their executors, administrators, and assigns, in trust that they and the survivors, etc., shall, as soon as the uses in the said settlement shall be spent and executed, or otherwise ended and determined, or at such time sooner as they shall think proper, sell and dispose of my said reversion and remainder in the same premises for the best price or prices which can be procured for the same, and shall pay and dispose of the monies arising from such sale unto and amongst all and every of my brothers' and sisters' children which shall be surviving, in equal shares and proportions." And after reciting in his will that about the time of the inclosure of Rugby fields he had purchased one yard-land in Rugby for the remainder of a term of 3000 years, and that on the late inclosure thereof there was awarded to him in lieu thereof a plot of ground containing 16 acres 3 roods or thereabouts, and that he (William Johnson) borrowed some money on bonds towards paying the purchase thereof, he "gave and bequeathed the said plot of ground, with the appurtenances, unto the said E. B., T. W., J. J., and P. W., their executors, administrators, and assigns, for the residue and remainder of the said term, in trust that they should out of the rents and profits, and by mortgage of the said plot of ground, raise the said principal money and interest which should be owing on the said bonds, and pay the same in discharge of the said bonds, and subject to such charge so to be made on the said lands, in trust to permit and suffer the rents and profits of the same plot of ground to be received by his wife Anne Johnson until his son Thomas Johnson should attain 21; and as soon as he should attain 21, in trust to permit and suffer the rents and profits thereof to be received by him during his life; and after his decease, in case his son should leave any children, in trust for them; but in case he left no child, but left a widow, then in trust that the rents should be paid to her for life; and after the decease of his son's children and widow, in trust for his (the testator's) wife for life; and after her decease, in trust to sell and dispose of the said plot of land for the best price which could be got for the same, and to pay and dispose of the money arising from such sale unto and amongst all and every of his (the testator's)

brothers' and sisters' children which should be then living, in equal shares and proportions." William Johnson appointed his wife Anne Johnson sole executrix of his will, and died in 1784, without having altered it. In 1788, his widow Anne Johnson died, leaving the testator's son, Thomas Johnson, her surviving; and in 1791, the said Thomas Johnson, the son, died a bachelor and intestate, aged 26 years. Upon the death of the widow and son of William Johnson, the testator, without issue, the trustees entered into possession of the trust premises, and were about to sell them, when Joseph Johnson (the plaintiff), one of the trustees, and also one of the legatees, being desirous to purchase, application was made to his co-trustees, as also to the different legatees (being 23 in number besides himself), to know the terms on which the premises were to be sold, and it was finally agreed by the trustees and by all the legatees (witnessed by a memorandum in writing to that effect, and signed by them, including the defendant who was one of the legatees) to sell the house for 300*l.* and the land for 700*l.*, each being distinctly valued. This sum the plaintiff agreed to give, and the following articles were in consequence prepared: "Be it remembered that it is this day agreed between Edward Boddington of etc., Philip Williams of etc., and Thomas Walker of etc., and Joseph Johnson of etc., as follows: to wit, the said E. B., P. W., and T. W., do hereby agree that they will, at their expense, on or before Old Lady-day next, make out a good title to, and by conveyances and assignments, to be prepared at the costs of the said Joseph Johnson, grant and assign unto the said Joseph Johnson, his heirs, executors, administrators, or assigns, or as he or they shall direct, All that messuage or tenement, outbuildings, backside, and appurtenances to the same belonging, situate in Rugby aforesaid, now in the occupation of Mr. W. L.; and also all that allotment of land lying in the fields of Rugby aforesaid, containing 16 acres and three roods or thereabouts, now in the occupation of Mr. S. D., together with all rights, etc.: In consideration whereof, the said Joseph Johnson doth agree that he will pay or cause to be paid unto the said E. B., P. W., and T. W., at the time above limited, the sum of 1000*l.* as and for the purchase-money for the said premises." Then followed some stipulations in favor of the purchaser, but not material to be stated: and the articles were signed by Edward Boddington, Philip Williams, Thomas Walker, and Joseph Johnson. In pursuance of the above contract, the title deeds were delivered to the plaintiff's attorney, by whom an assignment of the land was prepared from the mortgagee and the parties interested, which was executed by Edward Boddington and Philip Williams, but not by Thomas Walker, the other trustee, or any other person. An indenture of assignment of the house and premises in Rugby was also prepared, to which the four trustees were made parties of the first part; Job Walker and Lucy his wife, and Samuel Walker and Elizabeth his wife, (the said Lucy and Elizabeth being surviving acting executrixes of John Walker who survived Joseph Johnson, his co-trustee, in the trust created

by the deed of the 22d of August, 1761), of the second part; and one J. B. of the third part; and it was therein witnessed that the said Edward Boddington, Thomas Walker, and Philip Williams, at the request of Joseph Johnson (the plaintiff), and the said J. W. and Lucy his wife, and S. W. and Elizabeth his wife, assigned to J. B. as trustee for Joseph Johnson (the plaintiff) the remainder of the term of 1900 years in the house and premises in Rugby. This deed was executed by E. B. and P. W., two of the trustees, but by no other person. On the 17th of April, 1792, a meeting of the legatees was holden, at which the plaintiff and Philip Williams, one of the trustees, attended, and the purchase-money was then divided among the legatees according to their respective shares. The defendant received his share, amounting to 29*l.*, and signed a paper acknowledging his receipt from the four trustees of his share, and discharging them and the estate. At the Lent assizes, 1797, at Warwick, a Mrs. Sutton, who was the aunt and next of kin of the testator's son, Thomas Johnson, recovered from the plaintiff the house and premises situate in Rugby, by ejectment, and afterwards obtained a verdict for the mesne profits thereof, amounting to 74*l.* 5*s.* Upon this event taking place, eighteen out of the twenty-four legatees paid back to the plaintiff their several proportions of the money received by them on the sale of the house and premises to the plaintiff; but the defendant and five others refusing to do the same, the present action was commenced in order to determine the question. The plaintiff is still in possession of the plot of land in Rugby fields (upon which he has expended a considerable sum of money in building, drainage, and other improvements), being part of the premises purchased for the said sum of 1000*l.*, under the aforesaid agreement entered into between him and the other trustees, and receives annually the rents and profits thereof, amounting to 35*l.* 14*s.*, to his own use; and on application made to him on the part of the defendant, refuses to relinquish the purchase of the plot of land, and to resell the same for the parties interested under the testator's will.

The question for the opinion of the court was, Whether an action for money had and received was maintainable by the plaintiff against the defendant under the above circumstances? If so, then a verdict to be entered for the plaintiff; but if the court should be of a contrary opinion, then a verdict to be entered for the defendant.

Vaughan, Serjt., for the plaintiff.

Bayley, Serjt., for the defendant. The plaintiff is not entitled to recover back the money which he has paid, from any person; but if he be entitled to recover it back, still he cannot recover it from the present defendant, nor in this form of action. There is no fraud in this case, and therefore the rule of *caveat emptor* must prevail as laid down in Bree *v.* Holbech. Indeed the proper remedy for the plaintiff to adopt is to sue the three trustees, who by the article entered into in 1791 covenanted to convey. [Lord ALVANLEY, C. J. If he were to sue on that article he would recover

ls. damages in a court of law, and a court of equity would not compel the trustees to convey that to which they had no title.] The case of Cripps *v.* Read is distinguishable from the present, because there the action was brought against the very party who had sold the property as well as received the money, and the sale rested merely on a parol undertaking, and not as in this case on an article executed by those in whom the right to convey was supposed to be. But at all events the present defendant is not liable to be sued, for the contract of sale and the covenant to convey was made by the trustees with the plaintiff, and the defendant was no party to that contract. The rule therefore applies that where an express contract between the plaintiff and other parties is proved, the court will not imply a contract between the plaintiff and defendant respecting the same subject-matter. Indeed the only way in which the legatees were concerned in the transaction was in giving their consent to what the trustees thought fit to do. Nor is this the proper form of action to recover the money which has been paid, for the special contract is not rescinded, and till that is done the action for money had and received cannot be sustained. That the contract is not rescinded appears from the plaintiff still retaining part of his purchase; now as the sale of the whole was entire, the plaintiff is not at liberty to rescind the contract in part and consider it as still subsisting as to the remainder. Had this property been sold in parcels and by two distinct contracts, possibly a very different price would have been demanded and paid. The action is altogether novel, being an attempt to sue legatees in a court of law, and to recover part of the money paid under a special contract, by treating that contract as rescinded in part.

The opinion of the court was this day delivered by

Lord ALVANLEY, C. J., who after stating the case proceeded thus:— The premises out of which the present dispute arises were, together with the plot of land in Rugby field, purchased by the plaintiff for the gross sum of 1000*l.*; but it is to be remembered that the house in Rugby and the plot of land in Rugby field were each distinctly valued, the former at the sum of 300*l.* and the latter at the sum of 700*l.*; and upon those distinct valuations that contract was entered into which was afterwards reduced into the form of an agreement, and that deed of agreement was prepared which was executed by two only of the trustees, and by no other person. The contract having been thus far carried into execution, it was discovered that the limitation to the representatives of the settlor in the deed of 1761 was too remote, in consequence of which an ejectment was brought by the person entitled, and the plaintiff, who had paid the money, but to whom no legal conveyance had been made, was evicted from the possession. The flaw therefore being discovered before the purchase was completed, there is no pretence to say that the plaintiff had bought the estate, and that having obtained the title for which he contracted, he must abide by the consequences. The plaintiff, upon being evicted, was obliged to refund the rents and profits,

and several of the persons interested consented to repay their proportions of the purchase-money; but some (among whom is the present defendant) have refused; and the question now is, whether under these circumstances the plaintiff be entitled to recover against the defendant in an action for money had and received? My Brother HEATH nonsuited the plaintiff at the trial, on the idea that the object of the action was to call upon a legatee to refund a legacy; a matter which he thought could only be agitated in a court of equity. It turns out however that this is not an action for repayment of a legacy. If such had been the object of the action, I agree that it could not have been maintained. If an executor, thinking that he has settled the affairs of his testator, pay the legacies, I have no difficulty in saying that a court of common law would not entertain an action for money had and received against a legatee, since such a court cannot take into consideration, as a court of equity would do, the mode in which the funds might have been applied. In the case of Moses *v.* Macferlan,[1] some principles were laid down, which are certainly too large, and which I do not mean to rely on; such as that, wherever one man has money which another ought to have, an action for money had and received may be maintained; or that wherever a man has an equitable claim he has also a legal action. I agree with the opinion of my Lord Chancellor in the case of Cooth *v.* Jackson,[2] where he expresses his doubt whether the courts of law have not gone too far in the discussion of equitable rights, since they cannot administer equity in the same way as courts of equity do; and shows that great injustice may arise from suffering a plaintiff to prevail in a court of law, whereas, if he were obliged to seek his remedy in a court of equity, much would also be provided in the defendant's favor. No man therefore is more disposed to be cautious in admitting equitable matters to be agitated in a court of law than myself. But as this is not a case between an executor and a legatee, in which the former seeks to recover the amount of any legacy paid to the latter, but between the purchaser and vendor of an estate, my difficulty has been how far the agreement is to be considered as one contract for the purchase of both sets of premises, and how far the party can recover so much as he has paid by way of consideration for the part of which the title has failed, and retain the other part of the bargain. This for a time occasioned doubts in my mind; for if the latter question were involved in this case it would be a question for a court of equity. If the question were how far the particular part, of which the title has failed, formed an essential ingredient of the bargain, the grossest injustice would ensue if a party were suffered in a court of law to say that he would retain all of which the title was good, and recover a proportionable part of the purchase-money for the rest. Possibly the part which he retains might not have been sold unless the other part had been taken at the same time, and ought not to be valued in proportion to its extent, but according to

[1] 2 Burr. 1005. [2] 6 Ves. Jun. 39.

the various circumstances connected with it. But a court of equity may inquire into all the circumstances, and may ascertain how far one part of the bargain formed a material ground for the rest, and may award a compensation according to the real state of the transaction. In this case however no such question arises; for it appears to me that although both pieces of ground were bargained for at the same time, we must consider the bargain as consisting of two distinct contracts; and that the one part was sold for 300*l.* and the other for 700*l.* It has not been suggested that they were necessary to the occupation of each other. It amounts therefore to no more than this: that the plaintiff, being one of the executors who were about to sell the house, and also to sell the land, to both of which the legatees undertook to make a good title, advanced his money to the legatees on the purchase of those two lots, and now seeks to recover back the money for one of them, because the title to that has proved defective. We by no means wish to be understood to intimate that where under a contract of sale a vendor does legally convey all the title which is in him, and that title turns out to be defective, the purchaser can sue the vendor in an action for money had and received. Every purchaser may protect his purchase by proper covenants; where the vendor's title is actually conveyed to the purchaser the rule of *caveat emptor* applies. In the present case the plaintiff never has had any title conveyed to him, and therefore, we are of opinion, notwithstanding the party sued is a legatee, that the plaintiff has paid his money under a mistake, consequently the rule adopted in courts of law in such cases applies to him, and entitles him to recover that money from the party to whom it has been paid, in an action for money had and received.

Judgment for the plaintiff.

YOUNG *v.* COLE.[1]

In the Common Pleas, April 29, 1837.

[*Reported in* 3 *Bingham's New Cases*, 724.]

Action for money paid by the plaintiff to the use of the defendant, and for money had and received by the defendant to the use of the plaintiff.

The plaintiff, a stockbroker, was employed by the defendant in April, 1836, to sell for him four Guatemala bonds, of 25*l.* each.

The plaintiff, in three or four days, sold them to Briant for 300*l.*, and deducting 1*l.* 5*s.* for his commission, paid the defendant 298*l.* 15*s.*

Briant, who was conversant with the usages of the Stock Exchange, kept the bonds two days, and then sold them again.

[1] This case should have been inserted in the subdivision immediately following. — Ed.

The bonds in question were not stamped. But,

In 1829 the Guatemala government had issued an order, which was advertised in the London newspapers, requiring the holders of such bonds to produce them, and have them stamped by an agent of that government within a certain time; in default of which they would not be recognized by the state. Evidence of the advertisement was offered and rejected; but it was proved that since that time, unstamped Guatemala bonds were not a marketable commodity on the Stock Exchange.

Upon that ground, Briant's vendee soon returned the bonds in question. Briant, representing the matter to the plaintiff, the plaintiff, without communicating with the defendant or returning the bonds, refunded what Briant had paid him, and now sought to recover the amount which he had himself paid over to the defendant.

The defendant, upon being applied to, wrote to say that he was agent only as to a part of the bonds; but that, if the payment had been made for his own part, he would desire his clerk to reimburse the plaintiff. At the trial he did not show that all the bonds were not his.

The plaintiff could find no one in this country who had authority now to stamp the bonds; but one witness said he had procured a stamp to bonds of the same description.

Both parties, at the time of the transaction, were ignorant that a stamp was necessary. It was proved that brokers on the Stock Exchange do business as principals, in dealing with foreign stock, and are liable to be expelled if they do not make good their differences. The defendant's name was not mentioned by the plaintiff to Briant.

On behalf of the defendant, it was objected at the trial before TINDAL, C. J., that under these circumstances the plaintiff could not recover on the declaration for money paid or money had and received; but should have declared specially on the implied warranty by the defendant that the bonds he offered for sale were marketable bonds. Whereupon,

A verdict was taken for the plaintiff for the amount the defendant had received from him; with leave for the defendant to move to set the verdict aside and enter a nonsuit instead.

Sir *F. Pollock* accordingly moved the court to that effect, urging, that after Briant had kept the bonds for a length of time sufficient to enable him to decide whether he would make them his own or not, and had actually sold them to a third person, the plaintiff had no right to call on the defendant for a payment which the plaintiff was not compellable to make; at all events, not unless he had apprised the defendant of what he was about to do, and had returned the bonds so as to have afforded the defendant the opportunity of replacing them with stamped instruments. In Street *v.* Blay [1] it was held, that a person who had purchased a horse warranted sound, sold it again, and then repurchased it, could not, on discovering

[1] 2 B. & Ad. 456.

that the horse was unsound when first sold, require the original vendor to take it back again; nor could he by reason of the unsoundness, resist an action by such vendor for the price.

Wilde, Serjt., and *Ogle* showed cause.

F. Robinson in support of the rule.

TINDAL, C. J. It appears to me, that the sum for which the verdict has been given is properly called money received by the defendant to the use of the plaintiff. The money which the plaintiff delivered to the defendant was his own money, for he had sold the bonds as a principal to Briant, and was subject to all the responsibilities of a principal. He delivered the money to the defendant on an understanding that the bonds he had received from the defendant were real Guatemala bonds, such as were salable on the Stock Exchange. It seems, therefore, that the consideration on which the plaintiff paid his money has failed as completely as if the defendant had contracted to sell foreign gold coin and had handed over counters instead. It is not a question of warranty; but whether the defendant has not delivered something which, though resembling the article contracted to be sold, is of no value.

The remaining question is, whether the plaintiff had a right to rescind the contract he had entered into with Briant. It is to be observed that in that contract the defendant's name was never used; there was no contract between him and Briant; the plaintiff was the only person known to Briant. But stopping short of that, the universal custom of the Stock Exchange would authorize the plaintiff to rescind the contract without consulting the defendant; and the defendant has been in no respect damaged by what the plaintiff has done.

There is, however, another ground on which the verdict stands clear of objection; that is, that after the defendant was aware of all that had been done, he wrote to say that if the bonds were his own, he would send his clerk to pay the plaintiff the amount. Having omitted at the trial to show that he held them in the capacity of agent, as he had asserted, his letter is a ratification of what the plaintiff had done, and the verdict ought not to be disturbed.

PARK, J., concurred.

BOSANQUET, J. I agree in the principle of the cases which have been cited as to breach of warranty, but this is not a case of that description. Here, no consideration has been given for the money received by the defendant: the bonds he delivered to the plaintiff were not Guatemala bonds, but, on the Stock Exchange, worthless paper; and the payment made by the plaintiff to Briant was not voluntary. According to the principle established by Child *v.* Morley, the defendant was bound to reimburse the plaintiff what he was thus compelled to pay. For it appeared to be the custom of the Stock Exchange, that in these cases the broker is treated as principal, and liable to be expelled if he does not make good his differ-

ences. Upon either of the counts, therefore, the plaintiff may sustain this action. And even upon the defendant's letter, unless he showed the bonds not to have been his own, the plaintiff is entitled to retain the verdict.

COLTMAN, J. I am of the same opinion. The first question is, whether the plaintiff was entitled to rescind the contract with Briant; and I am of opinion he was. The bonds which he had sold at the defendant's request were not Guatemala bonds, in the sense of the Stock Exchange. Therefore, even considering the plaintiff only as agent, when he received authority from the defendant to sell the bonds he received an implied authority to act as all brokers do upon similar occasions; that is, to rescind the contract if the article delivered turns out not to be the article sold. *Rule discharged.*

MORLEY *v.* ATTENBOROUGH.

IN THE EXCHEQUER, FEBRUARY 17, 1849.

[*Reported in* 3 *Exchequer Reports*, 500.]

ASSUMPSIT. The first count of the declaration stated, that in consideration that the plaintiff would buy of the defendant a harp for 15*l.* 15*s.*, the defendant promised that he had lawful right and title to sell it to the plaintiff, that the plaintiff bought the harp and paid for the same. Breach, that the defendant had not lawful right or title to sell the harp. There was also a count for money had and received to the plaintiff's use. Plea, *non assumpsit.*

At the trial, before PLATT, B., at the Middlesex sittings after Easter term, 1847, the following facts appeared: — In the year 1839, a person of the name of Poley, having hired a harp of Messrs. Chappell, music-sellers, pledged it with the defendant, a pawnbroker, for 15*l.* 15*s.*, on the terms that, if the sum advanced were not repaid within six months, the defendant should be at liberty to sell it. The defendant had no knowledge that the harp did not belong to the party pledging it. The harp not having been redeemed at the stipulated time, the defendant, in the year 1845, sent it with other articles to be sold by public auction. The auctioneers were accustomed to have quarterly sales of unredeemed pledges, of which the present sale was one, and on those occasions were in the habit of putting other lots into the sale. The sale extended over several days, and a general catalogue, comprising the articles to be sold on each day, stated on the titlepage, that the goods for sale consisted of "a collection of forfeited property, reserved, agreeably to Act of Parliament, for quarterly sale,[1] pledged prior to May, 1844," with certain pawnbrokers (naming them, and

[1] See 39 & 40 Geo. 3, c. 99, § 18.

amongst others the defendant), and that the lots without numbers were "other effects." Catalogues were also printed, applicable to each day's sale. The harp, which was numbered in the catalogue, was knocked down to the plaintiff for 15*l.* 15*s.*, but no warranty of title was given. The Messrs. Chappell, having afterwards discovered that the harp was in the plaintiff's possession, commenced an action against him for its recovery, whereupon the plaintiff gave up the harp to them, and paid the costs, for which, together with the price of the harp, the present action was brought. On behalf of the defendant it was objected, that there was no warranty of title, either express or implied, and that the plaintiff ought to be nonsuited. The learned judge directed a verdict for the plaintiff, reserving leave for the defendant to move to enter a nonsuit.

Martin having obtained a rule *nisi* accordingly,

Humphrey and *Bovill* showed cause in last Easter term (May 11). The question is, whether, on the sale of a personal chattel, the law implies a warranty by the vendor that he has good title to the thing sold. Some authorities certainly appear to militate against that proposition. Sprigwell *v.* Allen[1] was "an action upon the case, for falsely and fraudulently selling a horse to the plaintiff, as the proper horse of the defendant, *ubi revera* it was the horse of Sir J. L., because the plaintiff could not prove that the defendant knew it not to be his own horse (for the declaration must be that he did it fraudulently or knowing it to be not his own horse); for the defendant bought the horse in Smithfield, but not legally tolled; the plaintiff was nonsuit."[2] Also, it is said,[3] "If I take the horse of another man, and sell him, and the owner take him again, I may have an action of debt for the money; for the bargain was perfect by the delivery of the horse, and *caveat emptor*." Chandelor *v.* Lopus[4] was an "action upon the case, whereas the defendant, being a goldsmith, and having skill in jewels and precious stones, had a stone which he affirmed to Lopus to be a bezar stone, and sold it to him for 100*l.*, *ubi revera* it was not a bezar stone. The defendant pleaded not guilty, and verdict was given and judgment entered for the plaintiff in the King's Bench. But error was thereof brought in the Exchequer Chamber, because the declaration contains not matter sufficient to charge the defendant, viz., that he warranted it to be a bezar stone, or that he knew that it was not a bezar stone; for it may be that he himself was ignorant whether it were a bezar stone or not; and all the Justices and Barons (except Anderson) held, that for this cause it was error; for the bare affirmation that it was a bezar stone, without warranting it to be so, is no cause of action; and although he knew it to be no bezar stone, it is not material; for every one in selling wares will affirm that his wares are good, or the horse which he sells is sound; yet if he does not warrant them to be so, it is no cause of action."

[1] Aleyn, 91.

[2] See Williamson *v.* Allison, 2 East, 448, note.

[3] Noy Max. Bythewood's Ed. 209.

[4] Cro. Jac. 4.

There, however, the affirmation was as to the quality, not the title of the thing sold. In Early *v.* Garrett,[1] LITTLEDALE, J., says, "It has been held, that where a man sells a horse as his own, when in truth it is the horse of another, the purchaser cannot maintain an action against the seller, unless he can show that the seller knew it to be the horse of the other at the time of the sale, — the scienter or fraud being the gist of the action where there is no warranty, for there the party takes upon himself the knowledge of the title to the horse, and of his qualities." In Ormrod *v.* Huth,[2] TINDAL, C. J., in delivering the judgment of the Exchequer Chamber, says, "The rule which is to be derived from all the cases appears to us to be, that where, upon the sale of goods, the purchaser is satisfied without requiring a warranty (which is a matter for his own consideration), he cannot recover upon a mere representation of the quality by the seller, unless he can show that the representation was bottomed in fraud." There, again, the representation was as to quality, not title. [PARKE, B. I observe the CHIEF JUSTICE adds, "Although the cases may, in appearance, raise some difference as to the effect of a false assertion or representation of title in the seller, it will be found, on examination, that in each of those cases there was either an assertion of title embodied in the contract, or a representation of title which was false to the knowledge of the seller."] In Co. Litt. 102 a., there is this passage. "Note, that, by the civil law, every man is bound to warrant the thing he selleth or conveyeth, albeit there be no express warranty; but the common law bindeth him not, unless there be a warranty, either in deed or in law, for *caveat emptor*." But it does not appear whether the warranty there mentioned applies to quality or to title. In Walker's case[3] it is said, "Also, if a man sells goods for money to be paid at several days, in such case, although the goods be taken by one who hath right, before the day, yet the seller shall have an action of debt in respect of the contract." [PARKE, B. In Fitzherbert's Nat. Brev., 94 c., it is said, "If a man sell unto another man a horse, and warrant him to be sound and good, etc., if the horse be lame or diseased, that he cannot work, he shall have an action on the case against him. And so if a man bargain and sell unto another certain pipes of wine, and warrant them to be good, etc., and they are corrupted, he shall have an action on the case against him. But note, it behoveth that he warrant it to be good, and the horse to be sound, otherwise the action will not lie. For if he sell the wine or horse without such warranty, it is at the other's peril, and his eyes and his taste ought to be his judges in that case: 26 H. 6, 35." There is a case of Paget *v.* Wilkinson, referred to in the note to Williamson *v.* Allison,[4] in which HOLT, C. J., ruled, "that if a man sell blank lottery tickets, and afterwards another, as owner of these tickets, recover them of the vendee, unless the vendor *knew* them to be the property of another, *or war-*

[1] 9 B. & C. 928.
[2] 14 M. & W. 651.
[3] 3 Rep. 22 a.
[4] 2 East, 448.

ranted them, neither this action (under title 'Case of Torts in Nature of Deceit and other Wrongs'), nor assumpsit for money had and received to the vendee's use, will lie."] The doctrine of *caveat emptor* must have been introduced, because there was something against which the vendee could guard himself. Several authorities support the plaintiff's view. Crosse *v.* Gardiner,[1] was an action on the case against the vendor of goods, for falsely affirming them to be his own, without saying that he knew them to be the goods of another; and the court held, that the action lay on this bare affirmation, because the plaintiff had no means of knowing to whom the property belonged, but only by the possession. [PARKE, B., referred to Broom's Legal Maxims, chap. 9.] In Medina *v.* Stoughton,[2] HOLT, C. J., says, "Where one having the possession of any personal chattel sells it, the bare affirming it to be his amounts to a warranty, and an action lies on the affirmation; for his having possession is a color of title, and perhaps no other title can be made out; *aliter* where the seller is out of possession, for there may be room to question the seller's title, and *caveat emptor*, in such case, to have either an express warranty or a good title." The distinction, however, between the vendor's being in or out of possession is repudiated by BULLER, J., in Pasley *v.* Freeman.[3] But in Roswel *v.* Vaughan,[4] which was an action of deceit against a person for falsely affirming that he was incumbent of a certain vicarage, and had a right to the tithes, and afterwards selling them; it was held that the action would not lie, because he gave no warranty, and had not any possession. And in Kent's Commentaries[5] it is said, "In every sale of a chattel, if the possession be at the time in another, and there be no covenant or warranty of title, the rule of *caveat emptor* applies, and the party buys at his peril. But if the seller has possession of the article, and he sells it as his own, and not as agent for another, and for a fair price, he is understood to warrant the title." In Adamson *v.* Jarvis,[6] the court, after adverting to the cases, say, "These cases rest on this principle, that if a man, having the possession of property which gives him the character of owner, affirms that he is owner, and thereby induces a man to buy, when, in point of fact, the affirmant is not the owner, he is liable to an action." And in Peto *v.* Blades[7] it was held, that the law raises an implied promise, in a sheriff selling goods taken in execution, that he does not know that he is destitute of title to the goods. Furnis *v.* Leicester[8] was an action for deceitfully selling sheep, the defendant affirming them to be his own, *ubi revera* they were the sheep of J. S.; and "it was moved in arrest of judgment, that the action lay not, because he doth not show that the defendant had committed any offence in affirming them to be his, and he doth not show that he had any damage, or that J. S. had retaken them, or sued him for them, as 42 Ass. 8. *Sed non allocatur*, for the sale of goods

[1] Carth. 90.
[2] 1 Salk. 210; 1 Ld. Raym, 593.
[3] 3 T. R. 58.
[4] Cro. Jac. 196.
[5] Vol. 2, p. 478.
[6] 4 Bing. 66.
[7] 5 Taunt. 657.
[8] Cro. Jac. 474.

which were not his own, but affirming them to be his goods, knowing them to be a stranger's, is the offence and cause of action." In 2 Bl. Com. 451, it is said, "By the civil law an implied warranty was annexed to every sale, in respect to the title of the vendor; and so too, in our law, the purchaser of goods and chattels may have a satisfaction from the seller, if he sells them as his own, and the title proves deficient, without any express warranty for that purpose." In Allen *v.* Hopkins,[1] POLLOCK, C. B., in delivering the judgment of the court, says, "It was put in the course of the argument upon the ground of *caveat emptor*. I certainly can find no authority, and I have no recollection of ever hearing that doctrine applied to this case, that the buyer is bound to take care that the seller has a good title to the goods, and that, if it turn out that the seller has not a good title, the buyer of the goods should have taken care of that before he made the contract, and therefore is bound by the contract, notwithstanding he is able to prove that the seller has no title. The doctrine of *caveat emptor* applies not at all, as I apprehend, to the title of the seller, but to the condition of the goods." [PARKE, B. That is only a *dictum*. POLLOCK, C. B. The case, when examined, will be found to have no bearing on the present point; a judgment must be taken *secundum subjectam materiem*.] In Smith's Mercantile Law,[2] it is said not to be quite clear whether the warranty of title is express or implied. [PARKE, B., referred to Addison on Contracts, Ch. 6, s. 3.] The offering goods for sale is evidence for a jury that the party affirms the title to be good. [They also cited Robinson *v.* Anderton,[3] and Walker *v.* Mellor.[4]]

Martin and *Petersdorff, contra.* The law will not imply any warranty of title on the sale of a personal chattel. It is unfortunate that the words *caveat emptor* should have been used as a maxim. Their real meaning is this, that since, in the transfer of property, circumstances will inevitably occur by which one of the parties must be a loser, the loss, whether arising from defect of title or of quality, must fall on the purchaser, unless a deceit has been practised or a warranty given. That rule of the common law originates in a desire of peace; for if the rule were otherwise, there would be numerous actions by successive purchasers against their respective sellers, before the party in fault could be discovered. The passage from Co. Litt. 102 a., which is the earliest authority on the subject, is strictly applicable to title. Noy's Maxims, c. 42, Walker's case,[5] and Ormrod *v.* Huth,[6] are express authorities in the defendant's favor. In Crosse *v.* Gardiner[7] there was an affirmation by the seller that the goods were his own. The case of Medina *v.* Stoughton, as reported in Lord RAYMOND, 593, was merely assumpsit on a warranty, and what Lord HOLT there says is, "Where a man is in possession of a thing, which is color of title, an action will lie

[1] 13 M. & W. 94.
[2] Page 462, note, 4th Ed.
[3] Peake, 129.
[4] 17 L. J. Q. B. 103.
[5] 3 Rep. 22 a.
[6] 14 M. & W. 664.
[7] Carth. 90.

upon a bare affirmation that the goods sold are his own. For in such a case it amounts to a warranty, and so it was adjudged in this court, Mich. term, 1 Will. & M., B. R., between Crosse and Gardiner." Chandelor *v.* Lopus,[1] and Furnis *v.* Leicester,[2] show that on the simple sale of goods without warranty, the vendee must stand the loss. The note to Williamson *v.* Allison [3] supports that view. Peto *v.* Blades [4] has no bearing on the present point; and the language of POLLOCK, C. B., in Allen *v.* Hopkins,[5] was not material for the decision of the case. In Ross on Vendors and Purchasers,[6] it is said, "When the vendor has not affirmed the goods to be his, nor expressly warranted them, the vendee is without remedy, for the common law will not imply a warranty; and in such case the maxim is *caveat emptor*." [They also cited 1 Roll. Abr. tit. "Action sur Case" (P), pl. 8; Power *v.* Barham.[7]]

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B. This case was argued some time ago before my LORD CHIEF BARON, my Brothers ROLFE, PLATT, and myself, and stood over for our consideration. The plaintiff brought an action of assumpsit, stating, that in consideration that the plaintiff would buy a harp for a certain sum, the defendant promised that he, the defendant, had lawful right to sell it, and the breach assigned was that he had not.

It appeared on the trial before my Brother PLATT, that the defendant, who was a pawnbroker, had the harp pledged with him in the way of his business, and, the time having elapsed for its redemption, and the pledge being unredeemed, offered it for sale through certain auctioneers, who sold it to the plaintiff. It turned out that the harp had been pledged to the defendant by a person who had no title to it, and the real owner obliged the plaintiff to give it up, after it had been delivered to him by the defendant. But, of the want of title of the pawner to it the defendant was ignorant, and there was no express warranty. My Brother PLATT directed a verdict for the plaintiff, reserving leave to move to enter a nonsuit.

On showing cause, the case was fully argued, and every authority cited and commented upon on both sides, bearing on the question, whether there is an implied warranty of title in the contract of sale of an article, or under what circumstances there is a liability on the part of the vendor to make good a loss by defect of title.

It is very remarkable that there should be any doubt, as that, certainly, is a question so likely to be of common occurrence, especially in this commercial country. Such a point, one would have thought, would not have admitted of any doubt. The bargain and sale of a specific chattel, by our law (which differs in that respect from the civil law), undoubtedly transfers

[1] Cro. Jac. 4. [2] Cro. Jac. 474. [3] 2 East, 448. [4] 5 Taunt. 657.
[5] 13 M. & W. 94. [6] 282, 1st Ed.; 335, 2d Ed. [7] 4 A. & E. 473.

all the property the vendor has, where nothing further remains to be done according to the intent of the parties to pass it. But it is made a question, whether there is annexed by law to such a contract, which operates as a conveyance of the property, an implied agreement on the part of the vendor, that he has the ability to convey. With respect to *executory* contracts of purchase and sale, where the subject is unascertained, and is afterwards to be conveyed, it would probably be implied that both parties meant that a good title to that subject should be transferred, in the same manner as it would be implied, under similar circumstances, that a merchantable article was to be supplied. Unless goods, which the party could enjoy as his own, and make full use of, were delivered, the contract would not be performed. The purchaser could not be bound to accept if he discovered the defect of title before delivery, and if he did, and the goods were recovered from him, he would not be bound to pay, or, having paid, he would be entitled to recover back the price, as on a consideration which had failed. But when there is a bargain and sale of a specific ascertained chattel, which operates to transmit the property, and nothing is said about title, what is the legal effect of that contract? Does the contract necessarily import, unless the contrary be expressed, that the vendor has a good title? or has it merely the effect of transferring such title as the vendor has? According to the Roman law,[1] and in France,[2] and Scotland, and partially in America,[3] there is always an implied contract that the vendor has the right to dispose of the subject which he sells;[4] but the result of the older authorities is, that there is by the law of England no warranty of title in the actual contract of sale, any more than there is of quality. The rule of *caveat emptor* applies to both; but if the vendor knew that he had no title, and concealed that fact, he was always held responsible to the purchaser as for a fraud, in the same way that he is if he knew of the defective quality. This rule will be found in Co. Litt. 102 a.; 3 Rep. 22 a; Noy, Max. 42; Fitz. Nat. Brev. 94 c, in Springwell *v.* Allen,[5] cited by LITTLEDALE, J., in Early *v.* Garrett,[6] and in Williamson *v.* Allison,[7] referred to in the argument. The same principle applies to transfer by deed. Lord HALE says, "Though the words 'assign, set over, and transfer,' do not amount to a covenant against an eign title, yet, as against the convenantor himself, it will amount to a covenant against all claiming under him:" (Deering *v.* Farrington,[8] which was an assignment of a *chose in action.*)

It may be, that as in the earlier times the chief transactions of purchase and sale were in markets and fairs, where the *bona fide* purchaser without notice obtained a good title as against all except the Crown (and afterwards a prosecutor, to whom restitution is ordered by the 21 Hen. 8, c. 11), the

[1] *Vide* Domat, Book 1. tit. 2, § 2, art. 3. [2] Code Civil, c. 4, § 1, art. 1603.
[3] 1 Johns. Rep. 274; Broom's Maxims, 628, where this subject is well discussed.
[4] Bell on Sale, 94. [5] Aleyn, 91. [6] 9 B. & C. 932.
[7] 2 East, 449. [8] 3 Keb. 304.

common law did not annex a warranty to any contract of sale. Be that as it may, the older authorities are strong to show that there is no such warranty implied by law from the mere sale. In recent times a different notion appears to have been gaining ground (see note of the learned editor to 3 Rep. 22 a); and Mr. Justice Blackstone says, "In contracts for sale it is constantly understood that the seller undertakes that the commodity he sells is his own;" and Mr. Wooddeson, in his Lectures,[1] goes so far as to assert that the rule of *caveat emptor* is exploded altogether, which no authority warrants.

At all times, however, the vendor was liable if there was a warranty *in fact*: and at an early period, the affirming those goods to be his own by a vendor in possession, appears to have been deemed equivalent to a warranty. Lord HOLT, in Medina *v.* Stoughton,[2] says, that "where one in possession of a personal chattel sells it, the bare affirming it to be his own amounts to a warranty;" and Mr. Justice BULLER, in Pasley *v.* Freeman,[3] disclaims any distinction between the affect of an affirmation, when the vendor is in possession or not, treating it as equivalent to a warranty in both cases.

Some of the text writers drop the expression of "warranty" or "affirmation," and lay down in general terms, that if a man sells goods *as his own*, and the title is deficient, he is liable to make good the loss;[4] the commentator cites, for that position, Cro. Jac. 474, and 1 Roll. Abr. 70, in both which cases there was an allegation that the vendor *affirmed* that he had a title, and therefore it would seem that the learned author treated the expression, "selling as his own," as equivalent to an affirmation or warranty. So Chancellor Kent, in 2 Com. 478, says, "that in every sale of a chattel, if the possession be in another, and there be no covenant or warranty of title, the rule of *caveat emptor* applies, and the party buys at his peril; but if the seller has possession of the article, *and he sells it at his own*, and for a fair price, he is understood to warrant the title." From the authorities in our law, to which may be added the opinion of the late Lord Chief Justice TINDAL, in Ormrod *v.* Huth,[5] it would seem that there is no implied warranty of title on the sale of goods, and that if there be no fraud, a vendor is not liable for a bad title, unless there is an express warranty, or an equivalent to it, by declarations or conduct; and the question in each case, where there is no warranty in express terms, will be, whether there are such circumstances as to be equivalent to such a warranty. Usage of trade, if proved as a matter of fact, would, of course, be sufficient to raise an inference of such an engagement; and without proof of such usage, the very nature of the trade may be enough to lead to the conclusion, that the person carrying it on must be understood to engage that the purchaser shall enjoy that which he buys, as against all persons. It is,

[1] Vol. 2, p. 415. [2] 1 Salk. 210; Ld. Raym. 593.
[3] 3 T. R. 57. [4] 2 Black. Com. 451. [5] 14 M. & W. 664.

perhaps, with reference to such sales, or to executory contracts, that Blackstone makes the statement above referred to.

Similar questions occur in cases as to the quality of goods, in which it is clear there is, by law, no implied warranty; yet, if goods are ordered of a tradesman, in the way of his trade, for a particular purpose, he may be considered as engaging that the goods supplied are reasonably fit for that purpose. We do not suppose that there would be any doubt, if the articles are bought in a shop professedly carried on for the sale of goods, that the shopkeeper must be considered as warranting that those who purchase will have a good title to keep the goods purchased. In such a case the vendor sells "as his own," and that is what is equivalent to a warranty of title. But in the case now under consideration, the defendant can be made responsible only as on *a sale of a forfeited pledge eo nomine*. Though the harp may not have been distinctly stated in the auctioneer's catalogue to be a forfeited pledge, yet the auctioneer had no authority from the defendant to sell it except as such. The defendant, therefore, cannot be taken to have sold it with a more extensive liability than such a sale would have imposed upon him; and the question is, whether, on such a sale, accompanied with possession, there is any assertion of an absolute title to sell, or only an assertion that the article has been pledged with him, and the time allowed for redemption has passed. On this question we are without any light from decided cases.

In our judgment, it appears unreasonable to consider the pawnbroker, from the nature of his occupation, as undertaking anything more than that the subject of sale is a pledge and irredeemable, and that he is not cognizant of any defect of title to it. By the statute law,[1] he gains no better title by a pledge than the pawner had; and as the rule of the common law is, that there is no implied warranty from the mere contract of sale itself, we think, that where it is to be implied from the nature of the trade carried on, the mode of carrying on the trade should be such as clearly to raise that inference. In this case we think it does not. The vendor must be considered as selling merely the right to the pledge which he himself had; and therefore we think the rule must be absolute.

Since the argument, we find that there was a count for money had and received, as well as the count on the warranty, in the declaration. But the attention of the judge at the trial was not drawn to this count, nor was it noticed on the argument in court.

It may be, that though there is no implied warranty of title, so that the vendor would not be liable for a breach of it to unliquidated damages, yet the purchaser may recover back the purchase-money, as on a consideration that failed, if it could be shown that it was the understanding of both parties that the bargain should be put an end to if the purchaser should not

[1] See 1 Jac. 1, c. 21.

have a good title. But if there is no implied warranty of title, some circumstances must be shown to enable the plaintiff to recover for money had and received. This case was not made at the trial, and the only question is, whether there is an implied warranty. *Rule absolute.*

STRICKLAND *v.* SARAH TURNER, Executrix of E. H. LANE.[1]

In the Court of Exchequer, January 31, 1852.

[*Reported in* 7 *Exchequer Reports*, 208.]

Assumpsit for money had and received by the defendant, as executrix of Edward Henry Lane, deceased, Plea, *non-assumpsit*, and issue thereon.

By mutual consent and by a judge's order, a case, of which the following are the material facts, was stated for the opinion of this court.

The action was brought to recover the sum of 973*l.* 11*s.* under the following circumstances: Edward Henry Lane, of Sydney, New South Wales (the testator), was entitled for his life to an annuity of 100*l.* per annum, payable half yearly, on the 30th of March and the 30th of September, bequeathed to him under the will of a Mrs. Way.

The plaintiff was one of the executors, and the residuary legatee, of Mrs. Way.

On the 4th of June, 1847, Mr. Lane, then residing at Sydney, transferred the annuity by deed to Arthur Daintrey and Adrian Daintrey, who resided in England, to dispose of as his trustees and for his benefit.

In November, 1847, a correspondence was entered into between the Messrs. Daintrey and a Mr. Cookney, the attorney and agent of the plaintiff, upon the subject of the purchase of the annuity by the plaintiff. After much correspondence on the subject, the following letters passed between Mr. Cookney and Mr. Adrian Daintrey: —

16th December, 1848.

Dear Sir, — I shall be extremely obliged by an early and definitive answer on the subject; for if Mr. Strickland does not purchase, there are other persons ready to treat.

I am, etc.,

A. Daintrey.

J. T. Cookney, Esq.

21st December, 1848.

Dear Sir, — I fear if you can get a purchaser for much, if anything, beyond 1000*l.* after April next (as at that time another half-year's annuity will be due less a year's duty), that Mr. Strickland will decline treating for

[1] This case should have been inserted in the subdivision immediately following. — Ed.

it. My view is, that a purchaser ought to buy the annuity to pay 6 per cent at least, and to insure the life would cost nearly 3 per cent, and that would be 9 per cent for the purchase money. This would make the outside value 1100*l.*, 11 times 9 being 99, and the expense of purchase would far exceed another 1*l.* per annum. Supposing Mr. Lane to be dead when you sell, how do you propose securing the purchaser against this contingency? for, unless the insurance office would undertake to pay the money, a purchaser cannot be advised to part with his. Most probably you have considered these matters, and will favor me with your sentiments thereon.

I am, etc.,

J. T. Cookney.

A. Daintrey, Esq.

22d December, 1848.

Dear Sir, — Assuming that Mr. Strickland will purchase, I am in a condition immediately to convey, as I have a discretion to sell as low as 1000*l.* I will do so if Mr. Strickland will agree to purchase at that sum. This agreement to purchase would of course be conditional on my showing a good title to convey. My brother is in practice as a solicitor in Sydney, and he is concerned for Mr. Lane, who, when I last heard from my brother a short time since, was as well as ever.

A. Daintrey.

J. T. Cookney, Esq.

After a few other letters, the following letters passed between the same parties: —

26th January, 1849.

Dear Sir, — I have heard from Mr. Strickland, and although his full object will not be accomplished, he is willing to give 1000*l.* for the annuity; and looking, as you say, to the loose mode of the bequest, I think the offer a liberal one. If accepted, then the only point to be considered is, how the sale is to be completed in the absence of proof of Mr. Lane being alive.

Yours, etc.,

J. T. Cookney.

27th January, 1849.

Dear Sir, — I accept Mr. Strickland's offer of 1000*l.* for this annuity on the following conditions: 1st, That he take an assignment of the annuity from myself and my brother Adrian, under the assignment to us, a copy of which I inclose. 2dly, That the purchase be completed within one month from this day. 3dly, That Mr. Lane be at no expense about showing a title to the annuity, and that no deductions be made on account of legacy-duty remaining unpaid. 4thly, That the annuity, or a proportion of it, be paid up to the day of completion. Probably the signature of Mr. Lane to the original assignment may be known to yourself or Mr. Strickland.

. . . . . .

If the conditions are acceded to, I will come to town and settle as soon as you are prepared. My brother Adrian is resident there. I shall be much obliged by despatch. Proof of Mr. Lane's being alive will not of course be at all necessary.

I am, etc.,

A. DAINTREY.

31st January, 1849.

DEAR SIR, — The offer I made had reference to my letter of the 21st of December last, viz. the purchase of an annuity of 100*l.*, to be completed next April after the half year's annuity was paid and the duty satisfied, and having the balance of duty 18*l.* 2*s.* 4*d.* allowed out of his purchase money. This my client will be prepared to do on the 30th of next April,[1] unless the money is an object before, and in that case my client will be content to take 5*l.* per cent upon his purchase money to the 30th of April,[2] and give credit for the annuity, subject to the deduction for legacy duty, thus: —

	£	s.	d.
Say Purchase Money	1000	0	0
Half Year's Annuity to 30th April	50	0	0
	1050	0	0
A Year's Interest on 18*l.* 2*s.* 4*d.*, Fourth Year's Duty	0	18	0
	1050	18	0
Deduct 3d Year's Duty £18 2 4			
4th ditto 18 2 4			
2 Months' Interest from 28th of February to 30th of April on 1000*l.* 8 6 8			
	44	11	4
	£1006	6	8

If you are content with this arrangement I will proceed to raise the money, and let you have the draft assignment in a few days.

I am, etc.,

J. T. COOKNEY.

1st February, 1849.

DEAR SIR, — If your letter of 31st of January is to be read in connection with that of the 21st of December, the latter certainly favors the offer I have made; for it informs me that Mr. Strickland would not give more than 1000*l.* after April, when of course the instalment of annuity and duty would have been paid. I am sure that upon reference to this letter you will see that this is the fair construction of it, and I think, therefore, that the conditions of my last letter ought to be acceded to.

I am, etc.,

A. DAINTREY.

[1] Sic. [2] Sic.

3d February, 1849.

DEAR SIR, — I only referred you to my letter of the 21st of December, as evidence of what I thought the value of an annuity of 100*l.*, and that it was the object in view. Mr. Strickland does not, and did not, entertain my views, but considers the offer made in my last letter very fair and liberal.

Mr. S. will be glad to know if the offer will be accepted, and particularly if the money is to be paid this month.

Yours, etc.,

J. T. COOKNEY.

5th February, 1849.

DEAR SIR, — If Mr. Strickland will not give more than you say, *I must accept the offer.* I assume of course that the last half year's annuity has been paid. I should like to have the draft assignment as soon as possible, and to complete with all despatch, as Sir C. F.'s son is going out in about ten days, and will take charge of my letters to my brother.

I am, etc.,

A. DAINTREY.

19th February, 1849.

DEAR SIR, — I have been expecting the draft assignment as promised in a few days by your letter of the 31st ult. I hope to receive it without delay. I am, etc.,

A. DAINTREY.

20th February, 1849.

DEAR SIR, — I send you draft assignment and release. I think that the consideration liable to *ad valorem* duty will be 973*l.* 11*s.* 0*d.*, if the money is paid on the 28th inst, instead of the 30th April next: what say you?

I am, etc.,

J. T. COOKNEY.

	£	s.	d.
Amount of nominal Consideration	1000	0	0
Less 4th Year's duty £18 2 4			
and Interest on prompt Payment 8 6 8			
	26	9	0
Net Consideration	£973	11	0

23d February, 1849.

DEAR SIR, — I return you draft approved, with some slight alterations. I propose to settle at your office on Wednesday the 28th inst, at 10 o'clock, unless I hear from you to the contrary by return, and have made an appointment with my brother to that effect. I dare say you will favor me with a line by return at all events. I am, etc.,

A. DAINTREY.

24th February, 1849.

DEAR SIR, — I conclude the assignment to you is stamped; if not, you will of course get it done. The time you mention will suit very well.

Yours truly,

J. T. COOKNEY.

25th February, 1849.

DEAR SIR, — The assignment to myself and brother is not stamped, nor I believe is a stamp necessary, etc. Be pleased to let me hear from you by return, and let me have the engrossment here by return, or at etc., on Tuesday evening by seven o'clock. My brother will attend there to execute, and it is probable he will be obliged to leave London on Wednesday morning.

I am, etc.,

A. DAINTREY.

26th February, 1849.

DEAR SIR, — I am sorry to differ with you about the stamp duty. I am quite satisfied you could not compel a purchaser to take to the title without a 35*s.* on the assignment to you, and the Office would stamp it. I should like to see the deed of assignment to you, which my clerk can do when he attends at etc. to-morrow, to see your brother execute the proposed deed of sale to Mr. Strickland.

I am yours truly,

J. T. COOKNEY.

By indenture, bearing date the 28th of February, 1849, and then made between the said Arthur and Adrian Daintrey of the one part, and the plaintiff of the other part, after reciting that the said E. H. Lane was entitled to the said annuity, etc., for his life, and also reciting (*inter alia*) the said assignment of the 4th of June, 1847; and that the plaintiff, as such residuary legatee as aforesaid, had duly paid the said annuity for the use of the said E. H. Lane up to the 30th day of March next; and also reciting the said indenture of the 4th day of June, 1847, and that the said Messrs. Daintrey had contracted with the plaintiff for the absolute sale, etc., to him of the said annuity, and all growing and future payments thereof, for the price of 973*l.* 11*s.*, it was witnessed that, in pursuance of the said contract, and in consideration of the sum of 973*l.* 11*s.*, the said Messrs. Daintrey did grant, bargain, sell, etc., unto the plaintiff, his heirs, etc., all the said annuity or sum of 100*l.*, and all growing and future payments thereof, To have and to hold the said annuity unto the plaintiff, his heirs, etc., from henceforth during all the residue of the life of the said E. H. Lane, to the end and intent that the plaintiff, his heirs, etc., might be entitled to receive and retain the same for his and their own use and benefit.

The consideration money, amounting (exclusively of the arrears of the

said annuity) to 973*l.* 11*s.* was paid on behalf of plaintiff to the said Arthur Daintrey. And the following receipt was then signed by the said Arthur Daintrey, the sum of 86*l.* 19*s.* therein mentioned having been paid on the same day: —

Re Edward Lane's Annuity.

28th of February, 1849.

Received balance of one year's annuity to the 30th March next, viz., the sum of 86*l.* 19*s.*, after giving credit for legacy duty payable in respect of the said annuity.

(Signed) A. DAINTREY
(For Self & Co. — trustee).

Annuity	£100	0	0
Deduction	13	1	0
	£86	19	0

The transaction was perfectly *bona fide.*

It was subsequently ascertained, that the said E. H. Lane died at Sydney on the 6th of February, 1849, having previously made his will, and having appointed the defendant sole executrix thereof. The said sum of 973*l.* 11*s.* 0*d.* was paid by the said Arthur Daintrey into the Bank of Australasia, to the account of the said E. H. Lane, before the news of his death reached this country. It was admitted, that the same was, with the plaintiff's concurrence, received by the defendant as executrix of the said E. H. Lane after his death, subject to be refunded to the plaintiff, if, under the circumstances, the plaintiff should be so entitled.

The court were to be at liberty to draw any such inference from the facts of the case as a jury would be warranted in drawing.

The question for the opinion of the court was, whether, under the foregoing circumstances, the plaintiff was entitled to recover from the defendant as executrix of E. H. Lane the said sum of 973*l.* 11*s.* so paid; and judgment was to be entered in accordance with the opinion of the court.

Crowder (*Raymond* with him) for the plaintiff.

Bramwell (*Rew* with him) for the defendant.

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B. — The question in this case, which the court took time to consider, lies in a very narrow compass. The plaintiff brought his action against the defendant to recover back money paid by him for the purchase of an annuity bequeathed to Edward Henry Lane, of Sydney, New South Wales, by the will of Mrs. Elizabeth Way. That annuity had been assigned by Edward Henry Lane, who was still residing in Sydney, to Arthur Daintrey and Adrian Daintrey, in order that they, as his trustees, might dispose of it in England for his benefit. They accordingly entered

into a negotiation with the plaintiff, who was the residuary legatee under Mrs. Way's will, for the purchase of this annuity. The question between the parties is this, — whether the purchase took effect during the existence of the annuity. If it did, though but for an instant, the plaintiff is not entitled to succeed; for he purchased the annuity, and cannot complain that in so doing he has made a bad bargain, as the events have turned out. But if, on the contrary, the annuity had ceased to exist before his purchase, then he has got nothing for his purchase money, and is entitled to recover it back from the defendant, the executrix of Lane, who has received it from the trustees.

The question therefore is, what was the bargain, and when did it take effect. If the annuity was sold upon the 5th of February, 1849, by the acceptance contained in the letter of that date, the subsequent death of the annuitant at Sydney on the 6th of February, 1849, will defeat the plaintiff's claim. If, on the other hand, the agreement was for a future sale, to be effected by assignment of the annuity, which took place on the 28th of February, the previous death of the annuitant will entitle the plaintiff to recover.

We must therefore examine carefully the different letters and documents, to see which of these two views of the case we ought to adopt as the fair result of the whole correspondence. There is no doubt, that, if the purchase had been completed, that is to say, if there had been an agreement that from and after the 5th of February, 1849, the annuity was to belong to Mr. Strickland, and the money given for it to belong to the trustees, the subsequent death of Lane would make no difference. Even a bill for a specific performance could have been maintained upon such an agreement, according to the case of Kenney *v.* Wexham.[1] There there was an agreement dated 18th April, 1818, for the future purchase of an annuity by the payment of two instalments, the first in October, 1818, and the last in January, 1819. The death was subsequent to the last stipulated payment. And the Vice-Chancellor held, that from that date the purchaser became entitled to it, and that the subsequent death of the annuitant in October, 1820, did not prevent the purchaser from having a specific performance; and for this, Mortimer *v.* Capper,[2] Jackson *v.* Lever,[3] Coles *v.* Trecothick,[4] were cited.

But here in the correspondence we find no such arrangement till the assignment of the 28th of February. The offer which is stated by Mr. Strickland's agent, Mr. Cookney, in the letter of 31st January, 1849, is for the purchase of the annuity "to be completed next April, after the current half-year's annuity is paid, and the legacy duty then payable satisfied, and the future legacy duty allowed for;" and he adds, that his client will be prepared to do this on the 30th of April, unless they can agree for an ear-

[1] 6 Madd. 357.
[2] 1 Bro. C. C. 156.
[3] 3 Bro. C. C. 604.
[4] 9 Ves. 234.

lier day of payment, and, so to speak, to discount the payment of the 30th of April on that earlier day.

It is a clear stipulation throughout the correspondence, that the annuity shall continue to be paid up to that day, whatever that might be; and until that day was fixed it is impossible to ascertain what sum of money was to be paid and received. Now this was never ascertained or settled in the lifetime of the annuitant. The annuity, therefore, still continued to belong to Lane, and never, as the Vice-Chancellor says in Kenney *v.* Wexham, passed to the purchaser, till this was ascertained and the bargain finally arranged between them. When this was done, the annuity became the property of Strickland, and the money the property of the vendors. But then there was no annuity in existence. The money, therefore, which was paid, was paid wholly without consideration, and may now be recovered back from the defendant, to whom, as the executrix of Lane, it has passed. We think, therefore, that the judgment should be for the plaintiff.

Judgment for the plaintiff.

SAMUEL GURNEY AND OTHERS *v.* THOMAS SCURR WOMERSLEY AND ANOTHER.[1]

IN THE QUEEN'S BENCH, NOVEMBER 4, 1854.

[*Reported in* 4 *Ellis and Blackburn*, 133.]

ACTION for money had and received, and on accounts stated. Plea: Never indebted.

On the trial, before Lord CAMPBELL, C. J., at the London sittings after last Trinity term, it appeared that the plaintiffs are money-dealers and bill-brokers, carrying on business on a large scale in London under the firm of Overend, Gurney & Co. The defendants are also money-dealers and bill-brokers, carrying on business in London under the firm of Womersley & Burt.

On the 17th December, 1853, Womersley & Burt brought to Overend, Gurney & Co., for discount, what purported to be a foreign bill of exchange, drawn at Calcutta by J. Le Brun on P. & C. Van Notten of London for 3050*l.*, payable ninety days after sight to the order of T. Dupont of Paris, endorsed specially by T. Dupont, to W. B. Anderson, and accepted by P. & C. Van Notten. At the time when the bill was offered for discount it did not bear the endorsement of Anderson. Overend, Gurney & Co. agreed to discount the bill; and the bill was taken away by Womersley & Burt, and on the same morning, was left with Overend, Gurney & Co. endorsed in blank by W. B. Anderson. A discount ticket was made out, in the manner usual in business (which is explained hereafter), showing the amount of the bill, less

[1] This case should have been inserted in the subdivision immediately following. — ED.

the discount, viz.: 3011*l.* 19*s.* 7*d.*, and sent with Overend, Gurney & Co.'s check for that amount to Womersley & Burt. The check was paid by them into their own banker's; and it was duly honored.

Shortly afterwards, it was discovered that Le Brun, the supposed drawer, and T. Dupont, the supposed first endorser, were fictitious persons; and that the supposed acceptance of P. & C. Van Notten, who were a firm of high standing in London, was a forgery committed by Anderson. Anderson was tried for forgery, and convicted; and he was made a bankrupt.

The present action was brought to recover, from the defendants, the amount of the plaintiff's check of 3011*l.* 19*s.* 7*d.* given for this bill. It was not suggested that either the plaintiffs or defendants had, at the time of the discount, knowledge or means of knowledge that the bill was a forgery. The plaintiffs' case was that, they having given the money for an acceptance of P. & C. Van Notten, and what they took as such proving not to be such an acceptance, there was a total failure of consideration. The defendants contended that, the endorsement of W. B. Anderson being genuine, and there being recourse, such as it was, on that endorsement against his estate, the instrument was to some extent a bill, and the consideration for the money had not in point of law totally failed. They also contended that in this transaction they were only brokers, acting as agents for W. B. Anderson; that the contract was between Overend, Gurney & Co. and Anderson; and that the price was to be recovered back, if at all, from Anderson and not from the defendants. On this latter defence, which was that principally relied on at the trial, evidence was given, on both sides, both as to the general course of business of money-dealers and bill-brokers in London, and as to the particular transactions between those two firms of Overend, Gurney & Co. and Womersley & Burt.

The result of this evidence was to show that the business of a bill-broker, strictly speaking, that is, a trade confined entirely to acting as agent between the holder of the bill wishing to get it discounted and the capitalist willing to invest his money in the discount of such securities, is no longer known in the city; but that those who are now called bill-brokers are also money-dealers, and discount bills with their own money. When a money-dealer agrees to discount a bill, it is the usual course of business to make out a ticket of the discount, which states the name of the customer, the day when the bill will become due, and its amount. It then specifies the amount which the discount, for so many days as the bill has to run, comes to at the agreed rate of discount, and the amount of the commission, if there is any, and the sum which, after these are deducted, balances the amount of the bill. This ticket is attached to the money-dealer's crossed check for the balance; which check is, in practice, always drawn payable, not to any particular name, but to a number or bearer; and the check with the ticket attached is given to the customer. Most money-dealers at times require advances for themselves, which they obtain from other money

dealers, frequently by rediscounting particular bills, which the borrowing money-dealer endorses to the person making the advance; and frequently by depositing a considerable number of bills at once as a security for one sum advanced;[1] in which case, if the bills do not bear the endorsement of the borrowing money-dealer, it is usual for him to give a written guarantee that the bills will be duly honored. But it is also usual with money-dealers and bill-brokers, when a customer brings a bill of a larger amount than it is convenient, for any reason, to take at the time, for the money-dealer and bill-broker to endeavor to find some other money-dealer willing to discount the bill on the strength of the names on it, without having the endorsement or guarantee of the first money-dealer. If he succeeds, the customer is never introduced to the money-dealer who makes the advance; but the money-dealer making the advance makes out the discount ticket in the name of the money-dealer who negotiates the transaction with him, and gives his check to him, exactly in the same manner as in cases in which the latter endorses or guarantees the bill; and the intermediate money-dealer makes out to the customer a distinct discount ticket, in which sometimes the rate of the discount is higher than that contained in the first ticket, sometimes there is in addition a commission charged; sometimes both; but always the amount of the check which is attached to it is less than the check received from the money-dealer who made the advance. The difference forms the intermediate money-dealer's remuneration in the transaction; there is no fixed usage as to its amount, which varies according to the state of the money market, and the agreement of the parties.

It appeared that Anderson had had real dealings with P. & C. Van Notten, and had previously discounted with Womersley & Burt several of their genuine acceptances for comparatively small sums. On the 7th October he brought to them three genuine such acceptances amounting together to 3301*l.* 1*s.* Womersley & Burt had laid down, as a rule regulating their business, that they would not advance money on any one transaction, beyond a certain limit, which this sum exceeded. Instead therefore of discounting these bills themselves, they desired Anderson to leave them with them. The three bills were taken to Overend, Gurney & Co. by Womersley & Burt. Womersley & Burt were asked if they would endorse or guaranty the bills, but declined to do so. The partner in the firm Overend, Gurney & Co., who was conducting the transaction, observed that P. & C. Van Notten were the acceptors, and that Overend, Gurney & Co. would discount their acceptance at 5½ per cent, being the rate at which the Bank of England then discounted the best bills, without any endorsement or guarantee from Womersley & Burt, and jestingly added that, for an extra half per cent, they would agree not to have recourse against any of the other parties. Accordingly, the discount ticket was made out by Overend,

[1] See Haynes *v.* Foster, 2 C. & M. 237; Foster *v.* Pearson, 1 C. M. & R. 849.

Gurney & Co. to Womersley & Burt, deducting discount at the rate of 5½ per cent per annum for the time these bills had to run; and Overend, Gurney & Co.'s check was given for the balance, which was 3285*l.* 2*s.* 8*d.* Womersley & Burt made out a separate discount ticket from them to Anderson, deducting discount at the rate of 6 per cent per annum, and gave him their check for 3283*l.* 13*s.* 9*d.* The difference between those two checks, viz. 1*l.* 8*s.* 11*d.*, formed the remuneration of Womersley & Burt. After this, several other genuine acceptances of P. & C. Van Notten were discounted for Anderson in the same manner, the parties assuming tacitly that the transactions were on the same footing as the first. In each case Overend, Gurney & Co. took the discount which at the time was the Bank of England rate; and Womersley & Burt in each case made out a separate ticket at a different rate, and gave their own check to Anderson. All these bills were duly honored.

On the 17th December, when the forged bill, the subject of this action, was brought, Overend, Gurney & Co. made out the ticket at the rate of 5 per cent, in the name of Womersley & Burt, and gave their check for the balance, viz. 3011*l.* 19*s.* 7*d.* Womersley & Burt made out the ticket from them to Anderson at the rate of 6 per cent discount, and also charging him ½ per cent commission on the amount of the bill, and gave him their check for the balance, viz. 2989*l.* 2*s.* 5*d.*; so that on this transaction they were to receive a remuneration of 22*l.* 17*s.* 2*d.* On each of these occasions the transaction was entered in Overend, Gurney & Co.'s books as a discount to Womersley & Burt, and in Womersley & Burt's books as a discount by Overend, Gurney & Co., and also as a discount to Anderson.

The Lord CHIEF JUSTICE told the jury that a person who gets a bill discounted, if he does not endorse or guaranty the bill, is not liable for the solvency of the parties to the bill; but that, if it turns out to be not a genuine bill, he is liable, as there is a complete failure of consideration. He told the jury that in this case there was a complete failure of consideration, and directed them, if they thought that the discount was a transaction between the plaintiffs and the defendants, to find for the plaintiffs; but, if they thought it a transaction between the plaintiffs and Anderson through the agency of the defendants, they should find for the defendants. The jury found for the plaintiffs.

Bramwell now moved for a rule *nisi* for a new trial.

COLERIDGE, J. I am of opinion that there should be no rule. First as to the verdict being against evidence. My Lord CHIEF JUSTICE is not dissatisfied with the verdict; and there certainly was ample evidence to support it; there were circumstances well worthy of consideration the other way; of which that which made the strongest impression on my mind was the fact that there were some bills endorsed or guarantied by the bill-brokers, and others which they did not guaranty. But this may be explained by reference to the amount of the bills, or the credit of the parties

to them. I therefore think that the verdict should not be disturbed on the ground that it is against evidence.

As to the supposed misdirection. The vendor of a specific chattel, it is not disputed, is responsible if the article be not a genuine article of that kind of which the seller represents it to be. And the question raised really is, What is the extent of the want of genuineness for which he is responsible? Without laying down the limits, it is clear to me that this case fell much within them. In effect here the defendants said to the plaintiffs, Will you take, without recourse to us, this bill which purports to bear the acceptance of P. & C. Van Notten? By doing so they represented it to be their acceptance, as it purported to be, and sold it, as answering that description. That being so, the case is *not* so strong as the bar of brass sold as a bar of gold, mentioned in Gompertz *v.* Bartlett,[1] or of the altered navy bill in Jones *v.* Ryde.[2]

WIGHTMAN, J. There was abundant evidence that the defendants acted as principals in the transaction: and the verdict ought not to be disturbed on that point.

As to the other point, it is in substance, that the plaintiffs really obtained an article of the kind which the defendants professed to sell, namely a genuine bill, and that there was no warranty that every signature on the bill was genuine. I think that the evidence showed that the defendants professed to sell a genuine bill accepted by P. & C. Van Notten. It was upon the genuineness of that acceptance that the plaintiffs entirely relied for their security. That being so, I cannot distinguish this case from those referred to by my Brother COLERIDGE. In considering whether a defect in an article renders it not an article of the kind of which it was represented to be on the sale, or is merely a breach of a collateral warranty, much must depend upon the special circumstances and terms of the rule. Here I think that the bill, not being an acceptance of P. & C. Van Notten, fails in what was the substance of the description by which it was held.

My Brother ERLE, who has left the court, authorizes me to say that he concurs.

Lord CAMPBELL, C. J. I agree that no rule should be granted in this case. The verdict of the jury finds that, in cases of this sort, in London, when a bill-broker takes a bill to a capitalist, and gets it discounted, the transaction is between the capitalist and the bill-broker, and not between the capitalist and the bill-broker's customer. And, so far from being against evidence, the verdict was founded on evidence to my mind justifying no other conclusion. There is, in practice, one advice note or discount ticket made out between the capitalist and the bill-broker, and another made out between the bill-broker and the customer. The rates of interest at which the bill is discounted are different, and bear no fixed relation to each other; and it is quite immaterial to the customer whether

[1] 2 E. & B. 854, E. C. L. R. vol. 75. [2] 5 Taunt 488, E. C. L. R. vol. 1.

the bill-broker takes the bill because he has got funds of his own which he is willing to invest in discounting it, or because he has found a capitalist willing to discount it on terms that will leave him a profit. In this case, the fact that there were distinct and separate contracts, one between the plaintiffs and the defendants, and the other between the defendants and Anderson, seems to me established most clearly.

As to the other objection; I am of opinion that, though the defendants, by not endorsing or guarantying the bill, preserved themselves from warranting the solvency of any of the parties, yet they did undertake that the instrument was what it purported to be. It is not disputed that in fact the discount of their bill by the plaintiffs was solely on the faith of its being an acceptance of P. & C. Van Notten, which it was not; and in consequence of its being so it was valueless. The possibility of recourse against the estate of Anderson, a convict and a bankrupt, did not prevent there being a total failure of consideration. *Rule refused.*

Bramwell, on a subsequent day (November 9), moved[1] for leave to appeal, under the Common Law Procedure Act, 1854,[2] on the point as to misdirection. He expressed some doubt whether, under this Act, the Court would grant leave to appeal on an *ex parte* application, or only grant a rule *nisi* so as to enable the opposite party to resist the application.

Cur. adv. vult.

Lord CAMPBELL, C. J., on a subsequent day (November 15), said that, after the repeated decisions, the court thought it must be considered settled law, that the plaintiffs were, under such circumstances, entitled to recover the money paid, as paid on a consideration which had failed. That being so, the court, on consideration, thought that it ought not in a sound exercise of its discretion to give leave to appeal. *Leave refused.*

EICHHOLZ *v.* BANNISTER.

IN THE COMMON PLEAS, NOVEMBER 17, 1864.

[*Reported in* 17 *Common Bench Reports, New Series*, 708.]

THIS was an action for money payable by the defendant to the plaintiff for money received by the defendant for the use of the plaintiff, for money paid by the plaintiff for the defendant at his request, and for money found to be due from the defendant to the plaintiff on accounts stated; Claim, 19*l.* Plea, never indebted, whereupon issue was joined.

The cause was tried in the court of record for the trial of civil actions within the city of Manchester, before the deputy recorder, when the facts

[1] Before Lord CAMPBELL, C. J., COLERIDGE, WIGHTMAN, and ERLE, JJ.

[2] 17 & 18 Vict. c. 125, § 35.

which appeared in evidence were as follows: — The plaintiff was a commission agent at Manchester. The defendant was a job-warehouseman in the same place. On the 18th of April last, the plaintiff went to the defendant's warehouse, and there saw, among other goods which the defendant had just purchased, 17 pieces of prints, which he offered to buy of him at $5\frac{1}{4}d.$ a yard. After some discussion, the defendant agreed to sell them, and gave the plaintiff an invoice in the following form, the whole of which was printed, with exception of the parts in italics: —

21 Chorlton Street, Portland Street,
Manchester. April 18th, 1864.

Mr. *Eichholz*

Bought of R. Bannister, Job-warehouseman

Prints, Fents, Grey Fustians, &c. Job and perfect Yarns in Hanks, Cops, and Bundles.

17 *pieces of prints*, 52 *yds. at* $5\frac{1}{4}d.$	£19	0	0
$1\frac{1}{2}$ *per cent for cash*		6	0
	£18	14	0

The plaintiff paid for the goods before he left the warehouse, and the defendant sent them by a porter to the plaintiff's place of business. The plaintiff sold the lot a few days afterwards for 19*l.* 15*s.* net. The goods were subsequently returned to the plaintiff, they having been recognized as goods which had been stolen from the premises of one Krauss. The goods were taken possession of by the police, and the thief, one Aspinall, was tried at the general quarter sessions of the peace holden in and for the City of Manchester on the 9th of May last, and convicted, and sentenced to penal servitude for four years.

On the part of the defendant, it was objected that there was no case to go to the jury, inasmuch as there is no implied warranty of title on the sale of goods.

For the plaintiff it was insisted that he was entitled to recover, the money having been paid upon a consideration which had wholly failed.

The learned judge directed a verdict to be entered for the plaintiff for the amount claimed, reserving leave to the defendant to move to set aside the verdict and enter a nonsuit or a verdict for the defendant, if the court should be of opinion that the plaintiff was not entitled to recover.

Holker, on a former day in this term, obtained a rule *nisi* accordingly. He referred to Crosse *v.* Gardner;[1] Pasley *v.* Freeman;[2] Morley *v.* Attenborough,[3] and Hall *v.* Conder.[4]

C. Pollock now showed cause. The question is, whether there is any implied warranty of title upon a sale of goods. That there is such warranty

[1] Carth. 90. [2] 3 T. R. 51. [3] 3 Ex. 500.
[4] 2 C. B. N. S. 22, 40 (E. C. L. R. vol. 89).

according to the Roman,[1] the French,[2] the American,[3] the Scotch, and almost every law of the continent of Europe, is clear: and there are not wanting authorities to show that it is so in the law of this country. "By the civil law," says Blackstone,[4] "an implied warranty was annexed to every sale, in respect of the title of the vendor; and so, too, in our law, a purchaser of goods and chattels may have a satisfaction from the seller, if he sells them as his own, and the title proves deficient, without any express warranty for that purpose." In Crosse *v.* Gardner,[5] the plaintiff declared *quod cum* (on such a day) *colloquium fuit* between the plaintiff and the defendant concerning the buying and selling two oxen, which the defendant then had in his possession, and he (the defendant) *adtunc et ibidem falso et malitiose affirmabat* that those oxen were his (the defendant's) proper goods, to which the plaintiff giving credit bought the said oxen of the defendant for so much money, when in truth the said oxen then were the proper goods of T. S., and that he the said T. S. *postea*, etc., lawfully recovered the said oxen from the plaintiff, and *licet* (the defendant) *sæpius requisit fuit*, yet he refused to give the plaintiff satisfaction for the same. Upon motion in arrest of judgment it was contended that the declaration was ill, because the plaintiff had not alleged that the defendant (*sciens* that these were the oxen of T. S.) did affirm them to be his oxen, nor allege this to be done *deceptivè*, nor set forth any warranty, but generally that the defendant did affirm these to be his (the defendant's) oxen, which was not sufficient to maintain the action, because a man may be mistaken in his property and right to a thing, without any fraud or ill intent. But the court held that the action would lie upon a bare affirmation, *ut supra*, — referring to Harvey *v.* Young,[6] Bosden *v.* Thinne,[7] Furnis *v.* Leicester,[8] Leakins *v.* Clissel,[9] and Ekins *v.* Tresham.[10] In Medina *v.* Stoughton,[11] it was held that an action lies against the seller of goods for affirming them at the time of the sale to be his own, when they were not, if he was in possession of them at the time of the sale; and that it is no answer that he bought them *bona fide*, and believed them to be his. Offering to sell generally is sufficient evidence of offering to sell as owner: per LEE, C. J., in Ryall *v.* Rowles.[12] And see the judgment of BULLER, J., in Pasley *v.* Freeman.[13] In Morley *v.* Attenborough,[14] although the conclusion arrived at by the court is, that there is no implied warranty of title in the contract of sale of a personal chattel, yet many of the authorities referred to in the judgment delivered by PARKE, B., sustain the present argument; and the decision may well be warranted by the

[1] Cod. lib. 8, tit. 45. Dig. lib. 21, tit. 2.

[2] Code Civil, art. 1626. Troplong, Ch. 4, De la Vente.

[3] Armstrong *v.* Percy, 5 Wend. 535; Blasdale *v.* Babcock, 1 Johns. 517; Sedgwick on Damages, 2d Ed. 293; 2 Kent's Commentaries, 478.

[4] 2 Bl. Com. 451. [5] Carth. 90. [6] Yelv. 20. [7] Yelv. 40.
[8] Cro. Jac. 474, 1 Roll. Abr. 91. [9] 1 Sid. 146. [10] 1 Lev. 102.
[11] 1 Ld. Raym. 593, Salk. 210. [12] 1 Ves. 348, 351. [13] 3 T. R. 56, 57.
[14] 3 Ex. 500.

circumstance of the vendor being a pawnbroker and the subject of sale an unredeemed pledge. "With respect to executory contracts of purchase and sale," says that learned judge, "where the subject is unascertained, and is afterwards to be conveyed, it would probably be implied that both parties meant that a good title to that subject should be transferred, in the same manner as it would be implied, under similar circumstances, that a merchantable article was to be supplied. Unless goods which the party could enjoy as his own, and make full use of, were delivered, the contract would not be performed. The purchaser could not be bound to accept if he discovered the defect of title before delivery; and, if he did, and the goods were recovered from him, he would not be bound to pay, or, having paid, he would be entitled to recover back the price, as on a consideration which had failed. But, when there is a bargain and sale of a specific ascertained chattel, which operates to transmit the property, and nothing is said about title, what is the legal effect of that contract? Does the contract necessarily import, unless the contrary be expressed, that the vendor has a good title? or, has it merely the effect of transmitting such title as the vendor has? According to the Roman law,[1] and in France,[2] and Scotland, and partially in America,[3] there is always an implied contract that the vendor has the right to dispose of the subject which he sells;[4] but the result of the older authorities is, that there is by the law of England no warranty of title in the actual contract of sale, any more than there is of quality. The rule of *caveat emptor* applies to both; but, if the vendor knew that he had no title, and concealed that fact, he was always held responsible to the purchaser as for a fraud, in the same way that he is if he knew of the defective quality. This rule will be found in Co. Litt. 102 *a*, 3 Rep. 22 *a*; Noy's Maxims, 42; Fitz. Nat. Brev. 94 C.; in Sprigwell *v.* Allen,[5] cited by LITTLEDALE, J., in Early *v.* Garrett,[6] and in Williamson *v.* Allison,[7] referred to in the argument. Lord HALE says, 'Though the words *assign, set over*, and *transfer*, do not amount to a covenant against an eign title, yet as against the covenantor himself, it will amount to a covenant against all claiming under him;' Deering *v.* Farrington.[8] It may be, that as in the earlier times the chief transactions of purchase and sale were in markets and fairs, where the *bona fide* purchaser, without notice, obtained a good title as against all except the Crown (and afterwards a prosecutor to whom restitution is ordered, by the 21 H. 8, c. 11), the common law did not annex a warranty to any contract of sale. Be that as it may, the older authorities are strong to show that there is no such warranty implied by

[1] *Vide* Domat, Book 1, tit. 2, § 2, art. 3.
[2] Code Civil, ch. 4, § 1, art. 1603.
[3] Defreeze *v.* Trumper, 1 Johns. Rep. 274; Broom's Maxims, 628, where this subject well discussed.
[4] Bell on Sale, 94.
[5] Aleyn, 91.
[6] 9 B. & C. 932 (E. C. L. R. vol. 17) 4 M. & R. 687.
[7] 2 East, 469.
[8] 3 Keb. 304.

law from the mere sale. In recent times a different notion appears to have been gaining ground (see note of the learned editor to 3 Rep. 22 *a*); and Mr. Justice Blackstone says, 'In contracts for sale it is constantly understood that the seller undertakes that the commodity he sells is his own;' and Mr. Wooddeson, in his Lectures,[1] goes so far as to assert that the rule of *caveat emptor* is exploded altogether, which no authority warrants. At all times, however, the vendor was liable if there was a warranty in fact; and, at an early period, the affirming those goods to be his own by a vendor in possession, appears to have been deemed equivalent to a warranty. Lord HOLT, in Medina *v.* Stoughton,[2] says that, 'where one in possession of a personal chattel sells it, the bare affirming it to be his own amounts to a warranty;' and Mr. Justice BULLER, in Pasley *v.* Freeman,[3] disclaims any distinction between the effect of an affirmation, when the vendor is in possession or not, treating it as equivalent to a warranty in both cases. Some of the text-writers drop the expression of 'warranty' or 'affirmation,' and lay down in general terms, that, if a man sells goods as his own, and the title is deficient, he is liable to make good the loss;[4] the commentator cites for that position Furnis *v.* Leicester,[5] in both which cases there was an allegation that the vendor affirmed that he had a title, and therefore it would seem that the learned author treated the expression 'selling as his own' as equivalent to an affirmation or warranty. So, Chancellor Kent, in 2 Comm. 478, says, that, 'in every sale of a chattel, if the possession be in another, and there be no covenant or warranty of title, the rule of *caveat emptor* applies, and the party buys at his peril; but if the seller has possession of the article, and he sells it as his own, and for a fair price, he is understood to warrant the title.' From the authorities in our law, to which may be added the opinion of the late Lord Chief Justice TINDAL, in Ormrod *v.* Huth,[6] it would seem that there is no implied warranty of title on the sale of goods, and that, if there be no fraud, a vendor is not liable for a bad title, unless there is an express warranty, or an equivalent to it, by declarations, or conduct; and the question, in each case, where there is no warranty in express terms, will be, whether there are such circumstances as to be equivalent to such a warranty. Usage of trade, if proved as a matter of fact, would, of course, be sufficient to raise an inference of such an engagement; and, without proof of such usage, the very nature of the trade may be enough to lead to the conclusion that the person carrying it on must be understood to engage that the purchaser shall enjoy that which he buys, as against all persons. It is, perhaps, with reference to such sales, or to executory contracts, that Blackstone makes the statement above referred to. We do not suppose that there would be any doubt, if the articles were bought in a shop professedly carried on for the sale of goods, that the shopkeeper must be considered as warranting that those who pur-

[1] Vol. 2, p. 415. [2] 1 Salk. 210; Ld. Raym. 593. [3] 3 T. R. 57.
[4] 2 Bl. Com. 451. [5] Cro. Jac. 474, and 1 Roll. Abr. 70. [6] 14 M. & W. 664.

chase will have a good title to keep the goods purchased. In such a case, the vendor sells 'as his own,' and that is what is equivalent to a warranty of title. But, in the case now under consideration, the defendant can be made responsible only as on a sale of a forfeited pledge, *eo nomine*. The vendor must be considered as selling merely the right to the pledge which he himself had." There is nothing in that judgment to militate against the claim of the plaintiff here. The circumstance of a tradesman selling goods in a public shop is a representation to all the world that that which he is selling is his own property. In Chapman *v.* Speller,[1] the defendant at a sheriff's sale bought goods from the sheriff for 18*l.*; the plaintiff, who was also at the sale, bought the defendant's bargain of him for 5*l.*, and paid him the 23*l.*; the defendant paid the sheriff the 18*l.*, and the sheriff began to deliver the goods to the plaintiff, but they were then claimed as not being the property of the execution-debtor, and were recovered by the true owner; and, in an action upon an alleged warranty that the vendor (the defendant) had title to sell, it was held that there was no implied warranty by the defendant that he had title, nor any failure of consideration, — the plaintiff having paid the 23*l.* to the defendant, not for the goods, but for the right which the defendant had acquired by his purchase, and this consideration not having failed. But, in delivering judgment, PATTESON, J., says: "In deciding for the defendant under these circumstances, we wish to guard against being supposed to doubt the right to recover back money paid upon an ordinary purchase of a chattel, where the purchaser does not have that for which he paid." In Sims *v.* Marryat,[2] Lord CAMPBELL, in delivering judgment, says, *obiter*, — "I do not think it necessary to inquire what the law would be in the absence of an express warranty. On that point the law is not in a satisfactory state. The decision in Morley *v.* Attenborough[3] was, that a pawnbroker, selling an unredeemed pledge as such, did not warrant the title of the pawnor. Of that decision I approve; but a great many questions, beyond the mere decision, arise on the very able judgment of the learned Baron in that case, which I fear must remain open to controversy. It may be that the learned Baron is correct in saying, that, on a sale of personal property, the maxim of *caveat emptor* does by the law of England apply; but, if so, there are many exceptions stated in the judgment which well nigh eat up the rule. Executory contracts are said to be excepted; so are sales in retail shops, or where there is a usage of trade; so that there may be difficulty in finding cases to which the rule would practically apply." [ERLE, C. J., referred to Noy's Maxims, c. 42, p. 89,[4] where it is said, "If I take the horse of another man, and sell him, and the owner take him again, I may have an action of debt for the money; for the bargain was perfect by the delivery of the horse; and *caveat emptor*."] That can hardly be considered law at this day.

[1] 14 Q. B. 621 (E. C. L. R. vol. 68).
[2] 17 Q. B. 281, 290 (E. C. L. R. vol. 79).
[3] 3 Ex. 500.
[4] Bythewood's Ed. 209.

Holker, in support of his rule. The real question is, whether there is a warranty of title to goods sold in a shop or warehouse; or, in other words, whether the money which the buyer has paid for them, can, if the vendor turns out to have no title, be recovered back as upon a failure of consideration. As a general rule, there is by the law of England, whatever may be the law of other commercial countries, no implied warranty of title on the sale of a chattel. The law is the same with respect to warranty of title to land as of title to goods. [BYLES, J. Chancellor Kent, in his Commentaries,[1] states the contrary to be the law of England as well as that of America.] The English authorities he refers to,[2] with the exception of the passage in Blackstone, do not bear him out. The rule is clearly laid down by TINDAL, C. J., in Ormrod *v.* Huth:[3] "The rule which is to be derived from all the cases appears to us to be, that where upon the sale of goods the purchaser is satisfied without requiring a warranty (which is a matter for his own consideration), he cannot recover upon a mere representation of the quality by the seller, unless he can show that the representation was bottomed in fraud. If indeed, the representation was false to the knowledge of the party making it, this would in general be conclusive of fraud; but, if the representation was honestly made, and believed at the time to be true by the party making it, though not true in point of fact, we think this does not amount to fraud in law, but that the rule of *caveat emptor* applies, and the representation itself does not furnish a ground of action. And, although the cases may, in appearance, raise some difference as to the effect of a false assertion or representation of title in the seller, it will be found, on examination, that in each of those cases there was either an assertion of title embodied in the contract, or a representation of title which was false to the knowledge of the seller." That, it is submitted, is a correct exposition of the law upon the subject; and it has never been questioned. Almost all the authorities are referred to and commented upon in Morley *v.* Attenborough; and the result arrived at is, that, by the common law of England, there is no implied warranty of title from the mere contract of sale of a chattel. The doctrine is still further carried out in Hall *v.* Conder,[4] where WILLIAMS, J., in delivering the judgment of the court, says: "With regard to the sale of ascertained chattels, it has been held that there is not any implied warranty of either title or quality, unless there are some circumstances beyond the mere fact of a sale, from which it may be implied. The law on this subject was very fully explained by PARKE, B., in giving the judgment of the Court of Exchequer in Morley *v.* Attenborough." [ERLE, C. J. In both those cases, the *dicta* you rely on were extra-judicial, not necessary

[1] Vol. 2, p. 478.

[2] 2 Bl. Com. 451; Bacon's Abridgment, Actions on the Case (E); Comyn on Contracts, Part 3, c. 8; Stuart *v.* Wilkins, Dougl. 18, and Parkinson *v.* Lee, 2 East, 314.

[3] 14 M. & W. 651, 664.

[4] 2 C. B. N. S. 22, 40 (E. C. L. R. vol. 89).

to the determination of the question in issue.] They are, at all events, strong expressions of opinion. [ERLE, C. J. Very.] In a note to Williamson *v.* Allison,[1] the following MS. note of Sprigwell *v.* Allen,[2] by BURNET, J., is given: "In an action on the case for selling a horse as the defendant's own, when in truth it was the horse of A. B., upon not guilty pleaded, it appeared that the defendant bought the horse in Smithfield, but did not take care to have him legally tolled; yet, as the plaintiff could not prove that the defendant knew it to be the horse of A. B., the plaintiff was nonsuited; for, the *scienter* or fraud is the gist of the action where there is no warranty; for there the party takes upon himself the knowledge of the title to the horse and of his qualities." The note goes on, — "See also Chandler *v.* Lopus, in the Exchequer Chamber,[3] to the same purpose. The same MS. also refers to another case: 'So, if a man sell six blank lottery tickets, and afterwards another, as owner of these tickets, recover them of the vendee, unless the vendor knew them to be the property of another, or warranted them, neither this action (under the title Case of torts in nature of deceit and other wrongs) nor assumpsit for money had and received to the vendee's use will lie. Per HOLT, C. J., Paget *v.* Wilkinson.'[4] And see Denison *v.* Ralphson,[5] where an opinion is given on the very point in question; for, on the second count, which stated a warranty that the goods sold were good and merchantable, and averred that the defendant delivered them bad and not merchantable, knowing them to be naught, the court observe, that, though the declaration be 'knowing them to be naught,' yet the knowledge need not be proved in evidence." [ERLE, C. J. If I sell an article as my article, is not that a contract that the article is mine? Has any court decided, that, under such circumstances, the money paid is not recoverable back, if it turn out that the seller has no title?] In Walker's Case,[6] it is laid down, that, "if a man sell goods for money to be paid at several days, in such case, although the goods be taken by one who hath right before the day, yet the seller shall have an action of debt in respect of the contract." To which is added in the note, — "And, unless the seller knew the goods to be the property of another, or warranted them, the buyer must bear the loss; for, the rule is, *caveat emptor*," — citing 1 Inst. 102 *a*; 2 Inst. 247. [ERLE, C. J. That is merely talking, not adjudging.] In Early *v.* Garrett,[7] LITTLEDALE, J., says: "It has been held, that, where a man sells a horse as his own, when in truth it is the horse of another, the purchaser cannot maintain an action against the seller, unless he can show that the seller knew it to be the horse of the other at the time of the sale, — the *scienter* or fraud being the gist of the action where there is no warranty, for there the party takes upon himself the knowledge of the title to the horse, and of his qualities." [ERLE, C. J., referred to Brown *v.*

[1] 2 East, 448.
[2] Aleyn, 91.
[3] Cro. Jac. 4.
[4] Tr. 8 W. 3, Guildhall.
[5] 1 Ventr. 366.
[6] 3 Co. Rep. 22 *a*.
[7] 9 B. & C. 928 (E. C. L. R. vol. 17); 4 M. & R. 687.

Edgington.[1]] In Broom's Legal Maxims,[2] the result of the authorities, ancient and modern, is thus summed up: "Upon the whole, we may safely conclude, that, with regard to the sale of ascertained chattels, there is not any implied warranty of either title or quality, unless there are some circumstances beyond the mere fact of a sale, from which it may be implied." The mere fact of the sale taking place in a shop surely cannot make any difference. As to the failure of consideration, that raises very nearly the same question. "It may be," says PARKE, B., in Morley *v.* Attenborough,[3] "that, though there is no implied warranty of title, so that the vendor would not be liable for a breach of it to unliquidated damages, yet the purchaser may recover back the purchase-money, as on a consideration that failed, if it could be shown that it was the understanding of both parties that the bargain should be put an end to if the purchaser should not have a good title. But, if there is no implied warranty of title, some circumstances must be shown to enable the plaintiff to recover for money had and received." In the present case, the defendant sold in the usual and ordinary course of business, without any warranty or representation of any sort, and without any knowledge that he had not the full right openly to sell that which he had as openly bought. To hold that any implication of warranty of title arises under such circumstances will be to establish a doctrine, not only new to the law of England, but fraught with inconveniences the extent of which cannot well be foreseen.[4]

ERLE, C. J. I am of opinion that this rule should be discharged. The plaintiff brings his action to recover back money which he paid for goods bought by him in the shop of the defendant, which were afterwards lawfully claimed from him by a third person, the true owner, from whom they had been stolen. The plaintiff now claims to recover back the money as having been paid by him upon a consideration which has failed. The jury at the trial found a verdict for the plaintiff, under the direction of the learned judge who presided; and a rule has been obtained on behalf of the defendant to set aside that verdict and to enter a nonsuit, on the ground that it is part of the common law of England that the vendor of goods by the mere contract of sale does not warrant his title to the goods he sells, that the buyer takes them at his peril, and that the rule *caveat emptor* applies. The case has been remarkably well argued on both sides; and the court are much indebted to the learned counsel for the able assistance they have rendered to them. The result I have arrived at, is, that the plaintiff is entitled to retain his verdict. I consider it to be clear upon the ancient authorities, that, if the vendor of a chattel by word or conduct gives the purchaser to understand that he is the owner, that tacit representation forms part of the contract, and that, if he is not the owner, his contract is

[1] 2 M. & G. 279 (E. C. L. R. vol. 40); 2 Scott N. R. 496. [2] 4th Ed. 768.
[3] 3 Ex. 511. [4] See Lee *v.* Bayes, 18 C. B. 599.

broken. So is the law laid down in the very elaborate judgment of PARKE, B., in Morley *v.* Attenborough,[1] where that learned judge puts the case upon which I ground my judgment. A difference is taken in some of the cases between a warranty and a condition:[2] but that is foreign to the present inquiry. In Morley *v.* Attenborough,[3] PARKE, B., says: "We do not suppose that there would be any doubt, if the articles are bought in a shop professedly carried on for the sale of goods, that the shopkeeper must be considered as warranting that those who purchase will have a good title to keep the goods purchased. In such a case the vendor sells 'as his own,' and that is what is equivalent to a warranty of title." No doubt, if a shopkeeper, in words or by his conduct, affirms at the time of the sale that he is the owner of the goods, such affirmation becomes part of the contract, and, if it turns out that he is not the owner, so that the goods are lost to the buyer, the price which he has received may be recovered back. I ventured to throw out some remarks in the course of the argument upon the doctrine relied on by Mr. *Holker*, which he answered by assertion after assertion, coming no doubt from judges of great authority in the law, to the effect that upon a sale of goods there is no implied warranty of title. The passage cited from Noy certainly puts the proposition in a manner that must shock the understanding of any ordinary person. But I take the principle intended to be illustrated to be this, — I am in possession of a horse or other chattel; I neither affirm nor deny that I am the owner; if you choose to take it as it is, without more, *caveat emptor;* you have no remedy, though it should turn out that I have no title. Where that is the whole of the transaction, it may be that there is no warranty of title. Such seems to have been the principle on which Morley *v.* Attenborough was decided. The pawnbroker, when he sells an unredeemed pledge, virtually says, — I have under the provisions of the statute[4] a right to sell. If you choose to buy the article, it is at your own peril. So, in the case of the sale by the sheriff of goods seized under a *fi. fa.*, — Chapman *v.* Speller.[5] The fact of the sale taking place under such circumstances is notice to buyers that the sheriff has no knowledge of the title to the goods; and the buyers consequently buy at their own peril. Many contracts of sale tacitly express the same sort of disclaimer of warranty. In this sense it is, that I understand the decision of this court in Hall *v.* Conder.[6] There, the plaintiff merely professed to sell the patent-right such as he had it, and the court held that the contract might still be enforced, though the patent was ultimately defeated on the ground of want of novelty. The thing which was the subject of the contract there, was not matter, it was rather in the nature of mind. These are some of the cases where the conduct of the seller expresses at the time of the contract that he merely

[1] 3 Ex. 500, 513.
[2] See Bannerman *v.* White, 10 C. B. N. S. 844.
[3] 3 Ex. 513.
[4] 39 & 40 G. 3, c. 99, § 17.
[5] 14 Q. B. 621.
[6] 2 C. B. N. S. 22.

contracts to sell such a title as he himself has in the thing. But, in almost all the transactions of sale in common life, the seller, by the very act of selling, holds out to the buyer that he is the owner of the article he offers for sale. The sale of a chattel is the strongest act of dominion that is incidental to ownership. A purchaser under ordinary circumstances would naturally be led to the conclusion, that, by offering an article for sale, the seller affirms that he has title to sell, and that the buyer may enjoy that for which he parts with his money. Such a case falls within the doctrine stated by Blackstone, and is so recognized by LITTLEDALE, J., in Early *v.* Garrett,[1] and by PARKE, B., in Morley *v.* Attenborough.[2] I think justice and sound sense require us to limit the doctrine so often repeated, that there is no implied warranty of title on the sale of a chattel. I cannot but take notice, that, after all the research of two very learned counsel, the only semblance of authority for this doctrine from the time of Noy and Lord COKE consists of mere *dicta*. These *dicta*, it is true, appear to have been adopted by several learned judges, amongst others by my excellent Brother WILLIAMS, whose words are almost obligatory on me; but I cannot find a single instance in which it has been more than a repetition of barren sounds, never resulting in the fruit of a judgment. This very much tends to show the wisdom of Lord CAMPBELL'S remark in Sims *v.* Marryat,[3] that the rule is beset with so many exceptions that they wellnigh eat it up. It is to be hoped that the notion which has so long prevailed will now pass away, and that no further impediment will be placed in the way of a buyer recovering back money which he has parted with upon a consideration which has failed.

BYLES, J. I also am of opinion that this rule should be discharged. It has been said over and over again that there is no implied warranty of title on the mere sale of a chattel. But it is certainly, as my Lord has observed, barren ground; not a single judgment has been given upon it. In every case, there has been, subject to one single exception, either declaration or conduct. Chancellor Kent[4] says: "In every sale of a chattel, if the possession be at the time in another, and there be no covenant or warranty of title, the rule of *caveat emptor* applies, and the party buys at his peril;" for which he cites the *dicta* of Lord HOLT in Medina *v.* Stoughton,[5] and of BULLER, J., in Pasley *v.* Freeman.[6] "But," he goes on, "if the seller has possession of the article, and he sells it as his own, and not as agent for another, and for a fair price, he is understood to warrant the title." Thus the law stands that, if there be declaration or conduct or warranty whereby the buyer is induced to believe that the seller has title to the goods he professes to sell, an action lies for a breach. There can seldom be a sale of goods where one of these circumstances is not present. I think Lord

[1] 9 B. & C. 928; 4 M. & R. 687.
[2] 3 Ex. 513.
[3] 17 Q. B. 291.
[4] 2 Com. 478.
[5] 1 Salk. 210; 1 Ld. Raym. 523.
[6] 3 T. R. 57, 58.

CAMPBELL was right when he observed that the exceptions had well-nigh eaten up the rule.

KEATING, J. I am of the same opinion. Whether it be an exception to the rule or a part of the general rule, I think we do not controvert any decided case or *dictum* when we assert, that, under circumstances like those of the present case, the seller of goods warrants that he has title. These goods were bought in the defendant's shop in the ordinary course of business. He gives an invoice with them, which represents that he is selling them as vendor in the ordinary course. I think the case falls within that put by PARKE, B., in Morley *v.* Attenborough,[1] of a sale in a shop, which he treats as a circumstance which beyond all doubt gives rise to a warranty of ownership. I was somewhat pressed by Mr. *Holker's* question whether there is more affirmance of title in the case of a sale in a shop than in a sale elsewhere. It may be that the distinction is very fine in certain cases. If a man professes to sell without any qualification out of a shop, it is not easy to see why that should not have the same operation as a sale in the shop. It is not necessary, however, to decide that question now. Here, the sale took place in a public shop, in the ordinary way of business, and every circumstance concurs to bring the case within the distinction put by PARKE, B., in Morley *v.* Attenborough.

Rule discharged.

CLARE *v.* LAMB AND ANOTHER.

IN THE COURT OF COMMON PLEAS, JANUARY 27, 1875.

[*Reported in Law Reports,* 10 *Common Pleas,* 334.]

ACTION for money had and received. Plea, never indebted.

The cause was tried before KEATING, J., at the sittings at Westminster after Easter term, 1874. The facts were as follows: — A Mrs. Steiner, who possessed seven leasehold houses in the Mile End Road, mortgaged them in 1863 to one Dodd, for 300*l.*, and afterwards further charged them with 100*l.* to a Mr. Watson. In 1864, Mrs. Steiner married Dr. Lamb, who died in 1869, having by his will appointed the defendants his executors. Shortly after the death of Dr. Lamb, Dodd, the first mortgagee, with the concurrence of the executors, put the premises up for sale by public auction, and Clare, the plaintiff, became the purchaser for 785*l.* The purchase-money was with the sanction of the executors applied in part in paying off the two mortgages and paying the expenses of the sale and conveyance; and the balance, 241*l.* 8*s.* 2*d.*, was paid by Clare to the executors. The conveyance was executed by all the parties, and Clare received possession

[1] 3 Ex. 513.

of the premises from Dodd. The deed contained no covenant for title in the executors.

In 1872, Mrs. Lamb, the widow of Dr. Lamb, discovering that she was entitled to the property, filed a bill in Chancery against Clare to recover possession. Clare gave notice of this claim to the defendants, Dr. Lamb's executors. On the 21st of February, 1874, a decree was pronounced in the suit, treating Clare as the assignee of the mortgagees, and directing an account, and that the surplus, after deducting the mortgage-money, interest, and expenses, should be paid over by Clare to Mrs. Lamb. Clare then (in October, 1873) brought this action against the defendants to recover back the money which he had been called upon to pay to Mrs. Lamb, viz., the value of the equity of redemption.

The learned judge nonsuited the plaintiff, on the ground that under the circumstances money had and received would not lie; but he reserved leave to the plaintiff to move to enter a verdict for him for 240*l.*, the agreed value of the equity of redemption, if the court should be of opinion that the action was maintainable.

H. Matthews, Q. C., in Trinity term last, obtained a rule *nisi* accordingly, on the ground that the money was paid under a mistake, and that there was a total failure of consideration for the payment. He cited Hitchcock *v.* Giddings,[1] Bos *v.* Helsham,[2] and Cooper *v.* Phibbs.[3]

Garth, Q. C., and *Charles*, showed cause.

Bosanquet and *Bompas*, in support of the rule.

GROVE, J. We are all agreed: but my Lord, being somewhat indisposed, has requested me to deliver my judgment first.

I am of opinion that the nonsuit was right, and that the rule should be discharged. The question arises thus: Certain property was sold by auction, and by the conveyance, to which the defendants were parties, a mortgage was transferred to the purchaser, and the equity of redemption, the value of which was agreed to be 240*l.*, was also conveyed to the purchaser. It turned out that, so far as the equity of redemption was concerned, the title of the vendors was wholly defective. Their testator, Dr. Lamb, having died, it was discovered that the equity of redemption was in his widow; and she filed a bill in equity, and a decree was made declaring her to be entitled to it. The question submitted at the trial was, whether the purchaser, having paid 240*l.* for property to which the vendors had no good title, could recover back that sum as money had and received upon a failure of consideration. In answer to the plaintiff's claim, it is contended that the maxim *caveat emptor* applies; and that, the defendants, as executors, having acted *bona fide* and in the belief that they had a good title, the plaintiff must take what he has got, and cannot recover back the money he has paid. It seems to me, upon principle, irrespective of the authorities, that the maxim referred to applies *a fortiori* to this case. If a man

[1] 4 Price, 135. [2] L. R. 2 Ex. 72. [3] L. R. 2 H. L. 149.

goes into a shop to buy a chattel, the seller, especially if he be the manufacturer, must necessarily know more of the nature and quality of the article than the buyer can. In that case, the rule *caveat emptor* is often a hard one, and yet it generally applies. In the case of the purchase of an interest in land, the person who sells places at the disposal of the buyer such title-deeds as he possesses and under which he claims. The purchaser has full opportunity for investigating the title of the vendor, and when he takes a conveyance he is assumed to have done so. Considerable inconvenience might result if this were not the rule. Conveyancers may agree upon the title, and, long after the conveyance has been executed, the whole transaction completed, and the proceeds disbursed, the seller might be called upon to return the purchase-money, by reason of some defect of which he had no notice at the time.

But there is an ordinary and well-known covenant which the purchaser may insist upon if he wishes to get more security than he gets by an investigation of the title; he may require a covenant for title; this additional security would probably increase the price. When the conveyance has been executed, all that the purchaser has to look to is the liability of the vendor under the deed. If it contains no covenant for title, the purchaser takes what the vendor gives him, or, rather, what he is able upon his title to give him, and the vendor will only be responsible for his own acts and incumbrances. Such I believe to be the general doctrine.

Now the principal authorities upon the question before us are Bree *v.* Holbech,[1] Johnson *v.* Johnson,[2] Cripps *v.* Reade,[3] and Hitchcock *v.* Giddings.[4] In addition to these, we have the high authority of one of the most eminent judges and writers upon the law of real property, viz., Lord St. Leonards. In Bree *v.* Holbech,[1] the defendant, a personal representative, having found among the papers of the deceased a mortgage-deed for 1200*l.*, assigned it to the plaintiff for a valuable consideration, the deed of assignment reciting that it was a mortgage-deed made or mentioned to be made between the mortgagor and mortgagee for that sum; and, after the lapse of six years, it was discovered that the supposed mortgage-deed was a forgery, and the purchaser thereupon brought money had and received to recover back the sum he paid for it. But Lord Mansfield said: "The basis of the whole argument is fraud. But here everything alleged in the replication may be true, without any fraud on the part of the defendant. He is an administrator with the will annexed, who finds a mortgage-deed among the papers of his testator, without any arrears of interest, and parts with it *bona fide* as a marketable commodity. If he had discovered the forgery, and had then got rid of the deed as a true security, the case would have been very different. He did not covenant for the goodness of the title, but only that neither he nor the testator had incumbered the estate. It was incumbent on the plaintiff to look to the goodness of it." That is a dis-

[1] 2 Dougl. 654, *a.* [2] 3 B. & P. 162. [3] 6 T. R. 606. [4] 4 Price, 135.

tinct authority to show that the purchaser must look to his covenant, and that the maxim *caveat emptor* applies. In Johnson *v.* Johnson[1] the purchaser was evicted for a defect of title after payment of the purchase-money, but before the conveyance was complete, and he was held to be entitled to recover back his money. Lord ALVANLEY thus expresses himself:[2] "We by no means wish to be understood to intimate that, where under a contract of sale a vendor does legally convey all the title which is in him, and that title turns out to be defective, the purchaser can sue the vendor in an action for money had and received. Every purchaser may protect his purchase by proper covenants: where the vendor's title is actually conveyed to the purchaser, the rule *caveat emptor* applies." Nothing can be more specific than that. His Lordship goes on: "In the present case, the plaintiff never has had any title conveyed to him, and therefore we are of opinion, notwithstanding the party sued is a legatee, that the plaintiff has paid his money under a mistake: consequently, the rule adopted in courts of law in such cases applies to him, and entitles him to recover that money from the party to whom it has been paid, in an action for money had and received." Lord St. Leonards, at p. 441 of the 13th edition of his book on Vendors and Purchasers, sums up the result of the authorities thus: "But, if the conveyance has been actually executed by all the necessary parties, and the purchaser is evicted by a title to which the covenants do not extend, he cannot recover the purchase-money either at law or in equity." For this he cites several cases in equity besides the cases I have already referred to. Not only have we the high authority of Lord St. Leonards for the doctrine I am adverting to, but the rule is substantially stated in the same terms in Dart's Vendors and Purchasers, 4th Ed. p. 711. There is only one case which *prima facie* looks the other way, viz., Hitchcock *v.* Giddings.[3] There, a purchaser bought the supposed interest of the vendor in a remainder in fee expectant on an estate-tail, and it turned out that at the time of the contract the tenant in tail had suffered a recovery, of which both parties were ignorant until after the conveyance was executed and a bond given for securing the purchase-money. The Court of Exchequer, in the exercise of its equitable jurisdiction, relieved the purchaser against the bond, on the ground of fraud. Lord Chief Baron RICHARDS, in giving judgment, said: "This is certainly a charge of fraud; for, it is that the defendant, having no title to any interest in these estates at the time of the contract, bargained as if he had, and that thereby he prevailed on the plaintiff to give him this bond. Now, if a person sell an estate, having no interest in it at the time, and takes a bond for securing the payment of the purchase-money, this is certainly a fraud, although both parties should be ignorant of it at the time; and that I believe to have been the case here. I must not be told that a court of equity cannot interfere where there is no fraud shown. If contracting parties have treated while under

[1] 3 B. & P. 162. [2] 3 B. & P. p. 170. [3] 4 Price, 135.

a mistake, that will be sufficient ground for the interference of a court of equity: but in this case there is much more. Suppose I sell an estate innocently, which at the time is actually swept away by a flood, without my knowledge of the fact; am I to be allowed to receive 5000*l.* and interest, because the conveyance is executed and a bond given for that sum as the purchase-money, when in point of fact I had not an inch of the land so sold to sell? That was precisely the case with the present defendant, and it would be hard indeed if a court of equity could not interfere to relieve the purchaser." The distinction between that case and the present is obvious, — there, the vendor was seeking to enforce performance of the contract by compelling the purchaser to pay for a thing he had not got; here, the plaintiff is calling upon the vendors to refund money which they honestly believed themselves to be entitled to when they received it. "*Potior est conditio possidentis.*" It does not appear to me that that case interferes with the doctrine laid down by the high authorities I have referred to, which, regard being had to the usual course of conveyancing, seems to me to be just.

DENMAN, J. I am entirely of the same opinion; and, after the full judgment pronounced by my Brother GROVE, I think it unnecessary to say more.

Lord COLERIDGE, C. J. I am of the same opinion. The rule is distinctly stated by Lord St. Leonards, and his conclusions are fully warranted by the cases before Lords MANSFIELD and ALVANLEY.

KEATING, J., concurred. *Rule discharged.*

RICHARD WOOD *et al.*, PLAINTIFFS IN ERROR *v.* ISRAEL SHELDON, DEFENDANT IN ERROR.

IN THE COURT OF ERRORS AND APPEALS OF NEW JERSEY, JUNE TERM, 1880.

[*Reported in* 42 *New Jersey Law Reports*, 421.]

WRIT of error to the Supreme Court, bringing up a judgment entered on a special verdict taken at the Essex Circuit.

P. L. Voorhees for the plaintiff in error.

F. A. Johnson and *H. C. Pitney* for the defendant in error.

The opinion of the court was delivered by

BEASLEY, C. J. The problem which the court is called on to solve, in this case, arises out of the following transaction: The defendants, in the court below, and who are now the plaintiffs in this writ of error, were stockholders in the Citizens' Gas Light Company of Newark, when the board of directors of that corporation passed a resolution declaring a scrip dividend of ten per cent on the amount of the capital stock,

with interest, payable at the option of the company, and in pursuance thereof, issued to the defendants the certificate set out in the special verdict, and which, through the mediation of a broker, was purchased of them by the plaintiff. This instrument certifies that the defendants are entitled to the sum of $1640, "payable ratably with other certificates issued pursuant to said resolution," at the pleasure of the company, with interest at the rate of seven per cent per annum. It is further found, in a certain suit in the Court of Chancery, that this and the other certificates of indebtedness of the same class, were illegally and fraudulently issued, and it was decreed that they should be delivered up to be cancelled. This having been done, the defendant in error brought this action to recover the money paid by him in this transaction.

The defence set up to this claim is, that there was no warranty annexed to this sale, and that the plaintiff got the certificate of indebtedness, which was the thing he bargained for.

But this position rests, plainly, I think, on a false basis. The plaintiff did not bargain for the certificate, but for the money of which the certificate purported to be the evidence of title. It serves to simplify the point to keep in mind the circumstance that this certificate is not a negotiable instrument, so that the rule of law pertinent to this matter is the rule that applies in the sale of an ordinary, uncommercial *chose in action*. The legal regulations which appertain to a sale of such an interest do not differ from those that attend the sale of a chattel. If a person sells a bond, in the absence of a special bargain, the legal incidents of the transaction are the same as if the article sold had been a horse. In both instances, under ordinary circumstances, there is an implied warranty of title in the thing sold, by the vendor. Mr. Benjamin, in his work on Sales, states what he conceives to be the English rule at the present day in these words, page 557: "A sale of personal chattels implies an affirmation by the vendor, that the chattel is his, and therefore he warrants the title, unless it be shown, by the facts and circumstances of the sale, that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the chattel sold." This is the well-known American doctrine. Applying this principle in the present instance, it is clear that, under the conditions of the sale, the defendants, by the mere act of selling, impliedly held out that the title to this money was in them, and the certificate itself contained that averment. It certified that the sum mentioned was due from the company to the defendants, and by the transfer of the certificate the defendants adopted that statement. In point of fact, there was no debt or money due, or corporate liability of any kind. There was nothing to sell, and, consequently, the defendants had no title to that which they undertook to sell. The ill-founded belief of the defendants, that they were possessed of a good title, is an ingredient of the case of no value, for the ground of recovery is not deceit, but warranty.

Looking thus at the facts before the court in the light of legal principles, I have felt no difficulty in reaching this result, nor do the authorities appear to be in any degree adverse to such a view. The only case to which my attention has been called, that seems to wear a hostile semblance, is that of Lettauer *v.* Goldman,[1] but, on examination, it will be perceived that that decision is rested on a circumstance that is wanting in the present case, for the court expressly states that the rule adopted and enforced is applicable only to a contract by force of which negotiable paper is transferred. The case referred to decided that the holder of a promissory note, which was tainted with usury, and was therefore void, could not be held liable, he having transferred it for a valuable consideration, and without knowledge, on his part, of such defect. This judgment is admittedly supported by no precedent, and if we reason by analogy, there seems to be strong ground to call it in question; but as the authority is irrelevant to the present case, it is unnecessary to pause upon it.

The other decisions, as it appears to me, lay down principles that favor an affirmance of the present judgment. Among these, Young *v.* Cole,[2] is a case of mark. In that case, the plaintiff was a stockbroker, and had sold for the defendant four Guatemala bonds, and had paid him the price. The bonds, after they had been in the hands of the purchaser two days, were discovered to be worthless, for want of being properly stamped; thereupon, the broker took them back, and, having reimbursed the purchaser, brought suit against the person for whom he had made such sale. It was held he was entitled to recover. The court, in assigning its reasons for this course, said: "It seems, therefore, that the consideration on which the plaintiff paid his money has failed as completely as if the defendant had contracted to sell foreign gold coin, and had handed over counters instead." In the case now pending, what was purchased was a debt due from this gas company, and what was received was a paper which, at the time, had no value, and which never had possessed any.

Gompertz *v.* Bartlett,[3] is a case noticeable in this connection. An unstamped bill of exchange, endorsed in blank, was sold without recourse by the holder, who was not a party to the bill. The instrument proved to have been drawn in England, and was unavailable for want of a stamp, the vendor and purchaser, at the time of the sale, being both alike ignorant of the defect. The decision was that the money so paid for the bill could be recovered, the ground being that the article sold, as a foreign bill, did not answer the description by which it was sold. In the present case, the thing ostensibly sold had never had a legal existence, so that it could not correspond with its description at the time of sale. It will be observed that these two cases are so much the stronger on the point in question, as they relate to commercial paper, which, from its peculiar nature, has a certain merchantable quality attached to it, so that when it is sold without

[1] 72 N. Y. 506. [2] 3 Bing. N. Cas. 724. [3] 2 El. & Bl. 849.

recourse, the inference is not altogether unreasonable that it was the understanding that the purchaser assumed some of the risks touching its validity. But such an implication is entirely out of place where the transaction is an assignment of an ordinary *chose in action*, for then the thing sold constitutes the entire consideration of the purchase, the bill of sale or certificate of transfer having no separate value of its own.

Nor should these remarks be closed without a reference to the important case of Thrall *v.* Newell, in which it was decided that an assignment that described the instrument assigned as "a note," amounted to a warranty that such note was a valid one so far as respected the capacity of the maker to enter into the contract. In that case, the note was void because of the insanity of the drawer of the note, and it was held that the money paid for such note could be recovered. The court also express a very decided opinion that if the affair had been devoid of any written contract, the defendant would have been liable to repay the money received by him for such void instrument, inasmuch as a warranty of the legal existence of the note would have been implied by law from the sale of it.

The cases cited in the brief of the counsel of the plaintiff in error, appear to me wanting in pertinency. They are decisions elucidating or enforcing the rule of *caveat emptor*, which it is insisted applies as well to a sale of stocks as to chattels. But that rule, in all cases, is applicable only to the quality of the thing sold, and not to its title. So it has no relevancy where a nonentity has been the subject of a sale. The precedents cited which maintain the principle that where a person gets what he intended to purchase, he cannot repudiate the bargain, no matter how worthless the thing so obtained may be, certainly can have no application to this case, in which the vendee did not get what he expected to get. Both parties to the present contract thought that he was obtaining a valid obligation of this gas company, binding them to pay this large sum of money. Instead of this, a nullity was passed to him.

The judgment should be affirmed.

For affirmance — The Chief Justice, Dixon, Knapp, Magie, Parker, Reed, Scudder, Van Syckel, Clement, Dodd, Green, Lathrop, Wales — 13.

For reversal — None.

[1] 19 Vt. 208.

WHITE *v.* NATIONAL BANK.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1880.

[*Reported in* 102 *United States Reports*, 658.]

ERROR to the Circuit Court of the United States for the District of Colorado.

The facts are stated in the opinion of the court.

Mr. *S. V. White* for the plaintiff in error.

Mr. *Henry M. Teller, contra.*

Mr. JUSTICE MILLER delivered the opinion of the court.

This is an action by White, who was plaintiff below, for the sum of $60,000, against the Miner's National Bank of Georgetown, Colorado. The declaration contains twelve special counts, upon as many drafts, drawn by the Stewart Silver Reducing Company on Thomas W. Phelps, payable in the City of New York to the order of the defendant, and indorsed by J. L. Brownell, its president, to S. V. White, and duly protested for non-payment.

To these counts is added another, in this language: "And for that also, heretofore, to wit, on the first day of April, A. D. 1876, at the said county of Clear Creek, the said defendant was indebted to plaintiff in $60,000, for so much money by the plaintiff, before that time, paid to the use of said defendant at its request, which said sum of money was to be paid to the plaintiff on request," with an allegation of request and refusal.

To this declaration the defendant pleaded the general issue and several special pleas, which it is unnecessary to notice.

The case was tried by a jury. The plaintiff recovered $15,000 debt and $2625 damages for interest, on account of three of the drafts. His claim on the other drafts, and for money paid at defendant's request, was rejected. He, therefore, brings this writ, and assigns for error the rulings of the court in the progress of the trial, which are set forth in a bill of exceptions.

J. L. Brownell, a partner in the firm of J. L. Brownell & Brother, doing business as bankers and brokers in the City of New York, was also president of the defendant, and interested in the Stewart Silver Reducing Company during the time of the transactions involved in this suit. As such president, he sold or transferred the several drafts on which this suit is founded to White, and received of the latter for the use of the bank the amount of said drafts less the discount. They were not paid at maturity, but due demand, protest, and notice were made. Those on which plaintiff recovered need not be further noticed. The others were rejected by the court as evidence against the defendant, on account of the form of the indorsement.

As they were, in this respect, alike, the form of one will be given here as a specimen of the whole: —

"$5,000.] OFFICE OF THE STEWART SILVER REDUCING COMPANY,
[L. S.] "GEORGETOWN, COL., OCT. 25, 1875.

"Four months after date pay to the order of the Miners' National Bank, Georgetown, Colorado, payable at the Third National Bank, New York City, five thousand dollars.

"STEWART SILVER REDUCING COMPANY,
"By J. OSCAR STEWART, *President.*

"To THOS. W. PHELPS, Esq.,
"Georgetown, Colorado."

Across the face, in red: "Accepted. — THOS. W. PHELPS."

Indorsed:

"No. . Pay S. V. White or order for account Miners' National Bank, Georgetown, Colorado. J. L. Brownell, p't.

"S. V. WHITE."

Because of the words "for account of Miners' National Bank of Georgetown, Colorado," in this indorsement by Brownell, as president of the bank, the Circuit Court ruled that there arose out of the transaction no obligation on the part of the bank to pay the draft or return the money, although due demand of the acceptor and refusal to pay was proved, with notice to the bank. This is the principal question which we are to decide.

The plaintiff relies largely on two propositions to establish his right to recover against defendant on this indorsement.

The first of these is that these words are merely directory and capable of explanation, and when it is shown by parol testimony, as in this case, that the plaintiff bought and paid full value for the draft, with the understanding that he was buying it as commercial paper, with the usual incidents of such a transaction, the indorser is liable in the usual manner, notwithstanding the words we have quoted.

The other proposition is that such is the custom of bankers who deal in such paper in New York, where these drafts are payable, and that the custom must control the construction of the contract.

We are not satisfied that either of these propositions is sound.

The language of the indorsement is without ambiguity, and needs no explanation, either by parol proof or by resort to usage. The plain meaning of it is, that the acceptor of the draft is to pay it to the indorsee for the use of the indorser. The indorsee is to receive it on account of the indorser. It does not purport to transfer the title of the paper or the ownership of the money when received. Both these remain, by the reasonable and almost necessary meaning of the language, in the indorser. It seems to us that the court below correctly construed the effect of the indorsement to be to make White the agent of the bank for the collection of the money.

If this be a sound view of the legal effect of the written indorsement, neither parol proof nor custom can be received to contradict it.

But we are aware of the necessity of proceeding with great caution in a case of first impression in regard to questions affecting commercial transactions, and we do not, therefore, decide this one, because we do not think it absolutely necessary to the case. For assuming this to be correct, we think the plaintiff was still entitled to recover more than he did.

The court below seems to have paid but little attention to the issue on the count for money paid to the use of defendant.

It appears distinctly by the evidence, and is uncontradicted, that the money paid by plaintiff on account of these drafts was placed to the credit of the defendant with its corresponding bankers in New York, and paid out on checks of the defendant, so that there is no question that the latter received the money. There is also no question but that plaintiff thought he was buying these drafts and that they became his property by their delivery to him. It is also evident that Brownell, the president of the bank, thought he was selling him the drafts, and there is evidence that neither White nor Brownell noticed the restrictive words of the indorsement. But if the court below was correct in holding that the indorsement — the evidence in writing of what the parties did — only made White the agent of the bank, and left the bank the owner of the drafts, then both White and Brownell were mistaken, and the money was paid and received under a mutual mistake. If White paid his money as purchase-money of the drafts, he paid it without any consideration, for he did not purchase the drafts. He only burdened himself with the duty of collecting the money for the bank, and the bank received and used his money without giving him any consideration for it. So, also, if White did not become the owner of the drafts, and if, when he should collect the money on them, he would hold it, in the language of the indorsement, "for the account of the bank," the jury might have been left at liberty to presume that the money which he paid was a loan or advance on the security of the paper delivered to him at the time. Either of these views of the transaction would justify a recovery under the money count, in which the delivery of the money and the delivery of the drafts, with the qualified indorsement, would be evidence of the payment and receipt of the money and the circumstances which attended it.

This indorsement is treated by counsel here as an assignment of the paper without recourse, in which the title to the paper passed, but the right to recourse to the assignor was cut off. But this is evidently an error. If the court below was correct, neither the title to the paper nor the right to the money under it passed. The only effect was to justify the acceptor in paying to the indorsee for the account of the bank. The legal effect of the transaction, as evidenced by the writing, was merely to enable White to collect the money for the bank. Though a restricted indorse-

ment, it was no assignment at all. It is not, therefore, a contradiction or a varying of the meaning of the written instrument to prove that, in the delivery of this paper to White, he and the bank were under a mistake as to the effect of it, or that he paid this money to the bank without any consideration, or that he advanced money to the bank in the idea that he was to be reimbursed out of the draft when collected.

The instructions given by the court, and the refusal of the prayer of plaintiff, fairly raised this question. All the drafts, except the three which had no such indorsement, were excluded from the jury. The jury were told that nothing else was before them.

The thirteenth instruction asked by plaintiff and refused by the court distinctly affirmed that if Brownell obtained from plaintiff sums of money on account of the drafts, which the court had refused as evidence, which money was placed to the credit of defendant in a New York bank, and afterwards drawn by defendant, the defendant was liable for such money.

The judgment will be reversed, and the case remanded with directions to set aside the verdict and grant a new trial; and it is

So ordered.

(f.) Mistake may be as to the Existence or Identity of the Subject-Matter of Sale.

BREE *v.* HOLBECH.

IN THE KING'S BENCH, MAY 18, 1781.

[*Reported in* 2 *Douglas*, 654.]

IN an action of assumpsit for 2000*l.* had and received to the plaintiff's use, — The defendant having pleaded the general issue, and the statute of limitations, — the plaintiff replied: That the writ was sued out on the 22d of August, 1780; that, on the 18th of February, 1773, the defendant asserted and affirmed that there was an indenture of mortgage, dated the 24th of June, 1768, made or mentioned to be made, between F. and S. of the one part, and W. H. (the defendant's uncle) on the other, for a term of years, granted to the said W. H. as a security for the payment of 1200*l.* with interest; that the defendant then further asserted and affirmed, that, after making the said indenture, W. H. died; that the defendant was his administrator with the will annexed, and there was due to him, as administrator, the said principal sum on the said security, that the plaintiff, relying on these assertions and affirmations, advanced 1200*l.* to the defendant, on his executing an indenture of assignment on the said 18th of February, 1773, which recited the mortgage, and purported, for the consideration of the 1200*l.* so advanced, to assign all the premises by the said recited

indenture of mortgage granted, for the remainder of the term, subject to the original power of redemption; that, in this indenture of assignment the defendant agreed with the plaintiff, that neither the said W. H. nor the defendant had done any act to incumber the mortgaged estate; that the said several assertions and affirmations of the defendant, and also the recitals in the said indenture of assignment, were false, inasmuch as there never was any such indenture of mortgage, nor the sum of 1200*l.* nor any other sum, due to the defendant, as administrator of W. H. on such security, in the manner the defendant had asserted and affirmed, and as in the indenture of assignment was recited, or in any other manner; and that neither the premises nor any part thereof passed by the assignment to the plaintiff, nor did any estate, right, or title therein, or to the said sum of 1200*l.* vest in him; that, by fraud and imposition, and by means of the said false assertions and affirmations, and false recitals, the plaintiff was induced to pay the said sum of 1200*l.* on the execution of the said indenture of assignment; that, at the time of the execution thereof and of paying the money, the plaintiff was ignorant of the falsehood of the said assertions, affirmations, and recitals, and of the fraud so practised upon him, and did not discover them till within the space of six years next before suing out the writ. To this replication, the defendant demurred generally. The case was, this day, argued by *Hill*, Serjeant, for the plaintiff; and *Chambre*, for the defendant.

Chambre, in support of the demurrer, contended, that there was nothing alleged in the replication which could take the case out of the statute. There was no fraud stated to have been practised by the defendant; for it was not averred that he knew of the falsehood of the different assertions and recitals. But, if there had been fraud, that would not have been sufficient; it was the plaintiff's business to look to the validity of his security; and there is nothing relative to fraud among the different exceptions and savings in the statute.

Hill, Serjeant, insisted: 1. That, in point of law, this was fraud on the part of the defendant, although he himself might not know of the falsehood; 2. That, where a party has been induced, by fraud, to pay money, the statute of limitations does not run, or at least only runs from the time when the fraud is discovered. — 1. The assertions of the defendant, he observed, were positive, without qualification, and therefore he made himself answerable for the truth of them; and, if any loss had been incurred by his mistake, it ought to fall upon him, not upon an innocent third person. On this first head, he cited, 1 Show. 68; 3 Mod. 261; Comb. 163; Hearne's Pleader, 102, 224; Cro. Car. 141; Sir W. Jones, 196; 2 Burr. 112; 12 Mod. 494; 2 Ves. 198 — 2. On the second point, he relied on Booth *v.* Lord Warrington, in Dom. Proc. 1714 (which he cited from the printed cases), and The South Sea Company *v.* Wymondsell.[1]

[1] 3 P. Wms. 143 (*a*).

Lord MANSFIELD, — The basis of the whole argument is fraud; and the question is, whether fraud is anywhere asserted in this replication. There may be many cases where the assertion of a false fact, though unknown to be false to the party making the assertion, will be fraudulent; as in the case of Sir Crisp Gascoyne, who insured a life, and affirmed it was as good a life as any in England, not knowing whether it was or was not. There may be cases too, which fraud will take out of the statute of limitations. But, here, everything alleged in the replication may be true, without any fraud on the part of the defendant. He is an administrator with the will annexed, who finds a mortgage-deed among the papers of his testator, without any arrears of interest, and parts with it, *bona fide*, as a marketable commodity. If he had discovered the forgery, and had then got rid of the deed as a true security, the case would have been very different. He did not covenant for the goodness of the title, but only that neither he nor the testator had incumbered the estate. It was incumbent on the plaintiff to look to the goodness of it.

Hill had leave to amend, in case, upon inquiry, the facts would support a charge of fraud.

SHOVE *v.* WEBB.

IN THE KING'S BENCH, MAY 14, 1787.

[*Reported in* 1 *Term Reports*, 732.]

ASSUMPSIT for goods sold and delivered; money paid, laid out, and expended; money had and received; and for goods sold and delivered to one A. Dobinson upon the defendant's credit and at his request. Plea the general issue.

On the trial at the sittings after last Hilary term at Guildhall before BULLER, J., a verdict was taken for the plaintiff, damages 160*l.* 17*s.* 3*d.*, subject to the opinion of the court as to the sum of 118*l.* 17*s.* 3*d.* part thereof.

The defendant on the 26th of July, 1783, executed a bond and warrant of attorney to confess judgment thereon in the court of Common Pleas, for securing an annuity of 25*l.* during the life of the defendant. The defendant also executed an assignment of his half-pay as an ensign in the army as a collateral security. The deeds for securing the annuity have been since set aside in the Common Pleas, because part of the consideration for which the annuity was granted was 46*l.* 19*s.* 9*d.* due from the defendant to the plaintiff for goods previously sold by the plaintiff to him, which was not specified in the memorial as registered. The residue of the consideration for which the annuity was granted, was 71*l.* 17*s.* 6*d.*, paid by the

plaintiff to the defendant in cash at the time of granting the annuity. The defendant is indebted to the plaintiff in 42*l.* for goods sold.

The question for the opinion of the court is, Whether the plaintiff is entitled to recover any, and what, sum beyond the sum of 12*l.* ?

The case was argued on a former day in this term by *Wood* for the plaintiff, and *Bower* for the defendant, when the court took time to consider of it.

On this day ASHHURST, J., delivered the opinion of the court.

The question in this case will depend on the construction of the statute 17 Geo. 3, c. 26, called the Annuity Act.[1] The contract was strictly legal, and not within the mischiefs intended to be remedied by the act.

The security then is set aside, not on account of any fraud or defect in the contract itself, but upon a formal defect in making the memorial, or at least it was an innocent mistake of the law. And taking that to be the case, when the security was vacated, the original contract revived. If indeed the sale had been made a few days before colorably, and with a view of afterwards stating the antecedent debt as a part of the consideration of an annuity intended to be granted, that would have totally altered the case; but as it is to be taken that they were *bona fide* sold, we think the plaintiff is entitled to recover for them.

In regard to the money paid as part of the consideration; as the security is not set aside for any fraud in the transaction, but merely for a mistake or omission in form, it becomes unconscientious in the party to retain it, and is therefore recoverable on the count for money had and received to the plaintiff's use. Therefore we are of opinion that the plaintiff is entitled to recover for his whole demand.

Judgment for the plaintiff 160*l.* 17*s.* 3*d.*

JONES AND OTHERS *v.* RYDE AND ANOTHER.

IN THE COMMON PLEAS, MAY 4, 1814.

[*Reported in* 5 *Taunton*, 488.]

THIS was an action of assumpsit for money had and received which was tried at the sittings in London, after Michaelmas term, 1813, before MANSFIELD, C. J., when a verdict was found for the plaintiffs, damages 1000*l.*, subject to a case, which in substance was, that the defendants, who were bill brokers, were possessed of a navy-bill which purported to have been issued by the transport board, and to bear date and have been registered on the 17th of July, 1813, and to be payable on the 15th of October, 1813,

[1] So much of the opinion as relates to the question of construction has been omitted. — ED.

and to be drawn on the treasurer of the navy in pursuance of a charter-party of 25th June, 1808, made with Messrs. Bell & Hobbs on behalf of the owners of the Wolga, Ward, master, hired to serve his majesty as a transport, for payment, ninety days after date, to Bell & Hobbs or their order, of 1875*l.*, and more to them, for interest thereon, from 7th July to 5th October following, when that bill would become due, being 90 days, at 3*d.* per cent *per diem*, 19*l.* 16*s.* 10*d.*, together 1884*l.* 16*s.* 10*d.*

	£	s.	d.
	1884	16	10
Deduct property tax	1	19	9
	1883	16	3

In both, the sum of 1884*l.* 16*s.* 10*d.* On the 23d of August, the defendants discounted this bill with the plaintiffs, who were stock and bill brokers; they, calculating the interest upon 1883*l.* 16*s.* 3*d.*, the apparent amount of the bill, for 53 days, from 23d August to 15th October inclusive, to be 13*l.* 13*s.* 6*d.*, then paid the defendants 1870*l.* 2*s.* 9*d.* as the difference, and received from them the bill. On 27th August the plaintiffs discounted the same bill with Williams, who calculating the interest upon the same apparent amount, for 49 days, from that day to the 15th of October, to be 12*l.* 12*s.* 10*d.* paid them 1871*l.* 3*s.* 5*d.* as the difference, and received from them the bill. The bill issued from the transport-office for 884*l.* 16*s.* 10*d.* only, but before the 23d of August some person had altered it by prefixing the figure 1 to the figures 884*l.* 16*s.* 10*d.*, and 883*l.* 16*s.* 3*d.* in the several places where those sums occurred, and by prefixing the same figure 1 to each of the dates 7th July and 5th October, so that before and when it was discounted by the several above-mentioned parties, who were all unconscious of the alteration, it had thereby acquired, in the particulars altered, the appearance of a bill for the net sum of 1883*l.* 16*s.* 3*d.* dated 17th July and payable 15th October. On 5th October, Williams presented it at the Navy Pay Office for payment, which was refused on account of the alterations; upon the requisition of the commissioners, Williams deposited with them, without the knowledge of the defendants, the altered bill; and in lieu of it accepted from them a new bill for the original amount, and received in discharge thereof 883*l.* 16*s.* 3*d.* after allowing 1*l.* 0*s.* 7*d.* for the property-tax charged on the interest. Williams thereupon demanded of the plaintiffs repayment of 1000*l.*, the difference between the sum he had received from the Navy Pay Office and the sum he had paid for the bill to the plaintiffs, which they repaid him, and brought the present action to recover from the defendants the like difference of 1000*l.*

Lens, Serjt., for the plaintiffs.

Vaughan, Serjt., for the defendants.

GIBBS, C. J. This is very distinguishable from the case of Price *v.* Neal, because there the bill was paid by the person who of all others was the

best judge whether the acceptance was his handwriting or not, and he says, on looking at it, this is my handwriting and I pay it. The case of Barber *v.* Gingell,[1] is a much stronger case even than that. It was an action on an acceptance written in the name of Gingell; the defendant had not accepted, nor ever acknowledged that he had accepted that bill; but it was proved that he had paid bills with similar acceptances, which in fact were forgeries of his son; and Lord KENYON, C. J., held that the defendant, having given credit to similar acceptances in the like course of dealing, was bound to pay the bill in question. The court are of opinion, that the plaintiff is entitled to recover the sum he seeks to recover by this action; and we think so on the ground on which it is put by my Brother *Lens* that this transaction is in the nature of an exchange between the two parties, made by the defendant upon the one hand, of a navy bill, professing to be a navy bill for 1884*l.* 16*s.* 10*d.*, and the defendant representing it to be a genuine navy bill of that amount, and by the plaintiff on the other hand, of a sum of money equivalent to the sum which would be paid upon that bill when it should become due, supposing that it were a genuine navy bill, minus the interest for the time which it yet had to run. Both parties were mistaken in the view they had of this navy bill; the one in representing it to be a navy bill of this description, the other in taking it to be such. Upon its afterwards turning out that this bill was to a certain extent a forgery, we think he who took the money ought to refund it to the extent to which the bill is invalid. The ground of the defendant's resistance is, that the bill is not indorsed; and that whensoever instruments are transferred without indorsement, the negotiator professes not to be answerable for their validity. This question was much mooted in Fenn *v.* Harrison;[2] and it is true to a certain extent, viz., that in the case of a bill, note, or other instrument of the like nature, which passes by indorsement, if he who negotiates it does not indorse it, he does not subject himself to that responsibility which the indorsement would bring on him, viz., to an action to be brought against him as indorser; but his declining to indorse the bill does not rid him of that responsibility which attaches on him for putting off an instrument as of a certain description, which turns out not to be such as he represents it. The defendant has in the present case put off this instrument as a navy bill of a certain description: it turns out not to be a navy bill of that amount, and therefore the money must be recovered back. Bree *v.* Holbech is very distinguishable. Common prudence required an administrator not to take on him more responsibility than his situation obliged him to incur, viz., to covenant that he had a good title notwithstanding any act done by himself; the covenant of an administrator ordinarily goes no further; and when an action is brought against him for money had and received, he says, you have all the security against me which a person in my situation ever gives, and that does not in the pres-

[1] 3 Esp. 60. [2] 3 T. R. 757.

ent case make me responsible. Compare this with the case of Cripps *v.* Reade,[1] cited by my Brother HEATH. There was no deed: the whole rested in parol, and the whole was founded on the presumption that the title was such as it purported to be: it was not such as it purported to be, and therefore the purchase-money could not be retained. In the present case, the navy bill is not such as it purported to be, and therefore the plaintiff is entitled to recover. A case somewhat similar very frequently occurs in practice on which I should not rely as governing the law, but that it is said by my Brother *Lens* to be sanctioned on the authority of a case so decided at *nisi prius*, by MANSFIELD, C. J., namely, where forged bank notes are taken. The party negotiating them is not, and does not profess to be, answerable that the Bank of England shall pay the notes; but he is answerable for the bills being such as they purport to be. Therefore the plaintiff must recover the difference.

HEATH, J. I am of the same opinion. If a person gives a forged bank note, there is nothing for the money: it is no payment. In the case of Cripps *v.* Reade, the defendant sold a term, supposing himself to be the personal representative of the deceased, without executing any assignment. Bree *v.* Holbech was cited upon the trial before LAWRENCE, J., and the rule *caveat emptor* was urged: the court refused a rule for a new trial. Lord KENYON, C. J., said that in Bree *v.* Holbech a regular conveyance was made, and no further covenants were to be added; but in the case of Cripps *v.* Reade, the whole had passed by parol, and the money had been paid under a mistake, and the action for money had and received would lie to recover it back.

CHAMBRE, J. I really cannot entertain a doubt on the question: if the defendant's doctrine could prevail, it would very materially impair the credit of these instruments. They are not in practice indorsed (or not beyond the first taker). A man takes this security, looking to the persons who are to pay it; he takes it on the presumption that it is a navy bill; it was once a navy bill, but from the moment wherein it was altered it became of no value whatsoever. It is unnecessary to go into the authorities. I agree it is incumbent on the plaintiff to show quite clearly that the payment of the 884*l.* 16*s.* 10*d.* was of the mere bounty and liberality of government, but no further. Everything that the plaintiffs have done, has been done for the good of the defendant. There is no doubt whatever that the judgment ought to be for the plaintiffs.

DALLAS, J. This is a case in which the parties are equally innocent, and have equal knowledge, and equal means of knowledge. I have no doubt whatsoever of the plaintiffs' right to recover. The case falls not only within the general principle that where a man has paid more than the thing is eventually worth, and the consideration fails, he may recover it back, but also comes within the express authority of Cripps *v.* Reade.

[1] 6 T. R. 606.

Upon the ground therefore that the money was in part paid by mistake, upon a consideration that has failed, I am of opinion, that the plaintiffs are entitled to recover it back.[1]

Judgment for the plaintiffs.

HITCHCOCK *v.* GIDDINGS.

In the Exchequer, June 4, 1817.

[*Reported in* 4 *Price*, 135.]

The plaintiff by the present bill sought to be relieved, on the ground of fraud, against a bond given by him to the defendant for 5000*l.* as the consideration for the purchase of the defendant's interest in a remainder in the real estates of Thomas Millard, which he had devised by his will to Elizabeth Millard and Anne Wrentmore for life; remainder to Anne Wrentmore Colmer in tail, remainder to F. and T. Vowles in fee; — and for an injunction to restrain the defendant from putting the bond in suit in the mean time, under the following circumstances: —

The defendant, in 1805, had purchased that remainder in fee, of the persons then entitled to it. In 1810 he agreed to sell a moiety of his interest to the plaintiff for 5000*l.*, who, though apprised by his professional adviser of the possibility of the devisee in tail suffering a recovery, which she might do, whereby the entail would be barred, and the remainder destroyed, still insisted on his purchase (having in the mean time directed a search to be made, to assure himself that no recovery had been suffered), expressing himself satisfied, and that he thought it worth 10,000*l.* The defendant, on the 10th May, 1810, executed to him a proper conveyance of his interest; and the plaintiff at the same time signed the bond in question.

In the course of the next month, the plaintiff's solicitor discovered that a recovery had been duly suffered by Miss Colmer in Easter term, 1808, of which he soon afterwards informed the plaintiff.

The defendant, by his answer, denied all knowledge of the recovery having been suffered when he executed the conveyance; and he proved that the purchase had originated with the plaintiff, and that he had refused to sell him the other moiety on his request. The plaintiff had paid 250*l.* for interest on the bond, which he now prayed might be repaid to him.

Fonblanque and *Wingfield* for the plaintiff.

Martin and *Heys* for the defendant.

Richards, Chief Baron. This is certainly a charge of fraud; for it is, that the defendant, having no title to any interest in these estates at the time of the contract, bargained as if he had; and that thereby he prevailed

[1] Leeds Bank *v.* Walker, 11 Q. B. D. 84, *accord.* — Ed.

on the plaintiff to give him this bond. That is, without doubt, what we call a fraud in courts of equity.

Then it is put that this transaction was an agreement for the purchase of a mere contingency; and if the court saw that it were, they might not be disposed to assist the plaintiff; for if a man should be foolish enough to make a purchase of such a chance, he must perhaps abide by the consequence of his rashness. But the fact was not so here. Under the will of the testator, the persons making title to the defendant had a vested remainder in fee simple, which would have vested in possession if it had not been in the mean time barred by a common recovery. Both parties, at the time of the contract, treated on the supposition that a recovery had not then been suffered. The whole of the evidence shows that that was the object in contemplation of the purchaser. If no recovery had been then suffered, the defendant had a remainder; if there had, he had no sort of interest whatever. But they agreed for the sale of the remainder, subject to the subsequent possible contingency of there being no recovery suffered. Now, if a person sell any estate, having no interest in it at the time, and takes a bond for securing the payment of the purchase-money, that is certainly a fraud, although both parties should be ignorant of it at the time; and that I believe to have been the case here. A contingency may certainly be sold on speculation, but not such as was sold here. Two parties are not to be allowed to enter into an agreement to deceive each other. But there was not even a contingency sold here; it was not selling an interest, subject to a chance, for the defendant had no interest at all to which a chance could attach.

I must not be told that a court of equity cannot interfere where there is no fraud shown. If contracting parties have treated while under a mistake, that will be sufficient ground for the interference of a court of equity; but in this case there is much more. Suppose I sell an estate innocently, which at the time is actually swept away by a flood, without my knowledge of the fact, am I to be allowed to receive 5000*l.* and interest, because the conveyance is executed, and a bond given for that sum as the purchase-money, when, in point of fact, I had not an inch of the land, so sold, to sell? That was precisely the case with the present defendant; and it would be hard, indeed, if a court of equity could not interfere to relieve the purchaser.

I am therefore clearly of opinion, that this bond must be relieved against. Bonds are not conclusive, as has been said, though they may be used to show that the party had acted deliberately; but wherever it can be made appear that they were not fairly taken, or that the money was not satisfactorily due, courts of equity will order them to be cancelled; for they will not suffer a party to recover on a bond against which a defendant has no defence at law, although it were given without such a consideration as would entitle the plaintiff at law to receive the money, the payment of which it is given to secure. That is, undoubtedly, the present case. And

if more had been done here, — if the money had been paid into court, — the defendant would not have been permitted to take it out, if the plaintiff could have shown, as he does now, that at the time of the sale the defendant had no interest.

Then as to the money which has been already paid; the same equity which attaches to the bond, must also attach to the interest which has been paid on it; for if an application for an injunction had been made immediately, it must have been granted, and then no interest would have accrued.

As to the costs, — as both parties have acted very foolishly, and are equally to blame, I shall not give costs on either side; although the defendant may have been wrong in resisting so reasonable an application.

The bond must be delivered up to be cancelled, and the interest which has been paid on it by the plaintiff must be refunded by the defendant.

Decree.

BANK OF ENGLAND *v.* TOMKINS.

In the Exchequer, April 21, 1842.

[*Reported in* 6 *Jurist*, 347.]

Assumpsit for money lent. Plea, *non assumpsit*. (There were other counts and pleas, but nothing turned on them.) At the trial before Lord Abinger, C. B., it appeared that this was an action brought to recover a sum of 8000*l.* under the following circumstances: — The defendant had deposited with the Bank of England eleven exchequer bills for 1000*l.* each, on which the bank advanced him 11,000*l.*, with an agreement, that, if the money were not repaid within a given time, the bank should be at liberty to sell the bills. 3000*l.* was repaid within the period specified, and three of the bills returned, but default having been made in the payment of the residue, the bank sold the eight remaining ones for 8000*l.* On the holder presenting these bills at the exchequer office, the signatures to them were pronounced to be forgeries, and payment refused accordingly; and the bank, being compelled to indemnify the holder, brought the present action. It appeared, by the evidence on the part of the plaintiffs, that the manufacture and issue of exchequer bills were regulated by Stat. 4 & 5 Will. 4, c. 15, s. 4, and the treasury regulations made in pursuance thereof; and that the only persons authorized to sign such bills were the controller and deputy controller of the exchequer, both of whom were examined at the trial, and declared the signatures to the bills in question to be forged. On cross-examination, the practice in the exchequer bills office, in the manufacture of exchequer bills, appeared to be, that paper with a peculiar water-mark

was manufactured for the purpose; they were afterwards stamped or printed in a particular place set apart in the office; they were then dated and numbered, in general, by two clerks, one of whom numbered the bill, the other the counterfoil; but sometimes, in the absence of either clerk, the whole was done by one alone. They were then taken to the controller or his deputy for signature; having received which, they were in a fit state to be issued. It appeared also, that a clerk, of the name of Smith, whose duty it was to number the bills, had the custody of the manufactured paper, and access to the bills after they were printed, and also to the seal; and that there was no person in the office to act as a check on his conduct; and, lastly, that the present bills were genuine in all points except the signature. On this evidence, Lord ABINGER told the jury, that the only question for their consideration was, whether the signatures to these bills were forged or not; for that, if they were forged, the plaintiffs were entitled to recover; and the jury found for the plaintiffs for the amount claimed.

Erle moved for a new trial, on the ground of misdirection. The true question for the jury was not, simply, whether these signatures were forged, but whether the exchequer office was not bound to pay these bills; for, if they were, there would be no failure of consideration, and the present action could not be supported. Now, the liability of the exchequer office is not inconsistent with these signatures being forged, inasmuch as the bills are issued on their own paper, and with their own stamp and seal; and it is owing to their negligent course of business in their office that money has been advanced on their bills. An action, perhaps, may not lie against the office, but the principle is the same, if these bills were such as ought to be paid in the regular course of business.

PARKE, B. It appears to me very clear, that no rule ought to be granted in this case. The question is, can the plaintiffs maintain this action for money lent and advanced, on the ground that they have not received from the defendant that which they bargained for? And I am of opinion that they can. The bargain they made was for marketable exchequer bills good in all respects, duly signed, sealed, and stamped, and which would be immediately paid on being presented at the exchequer office. The defendant's argument is, that the exchequer office is bound to pay these bills in their present state; namely, good in three of the essential requisites, but bad in the fourth, as having a forged signature. Now that is a question which we are not at all called on to determine at present. Whenever it comes before the proper tribunal it will be decided; it is enough for us to say that the plaintiffs did not bargain for a bill imperfect in any respect, or which might be enforceable against the exchequer by petition of right or otherwise, but for a bill good in all respects, and which would at once be paid or exchanged in the usual course and practice of the office. Now it is abundantly clear that this is not such a bill, that the plaintiffs have, therefore, not got what they bargained for, and are therefore entitled to be

repaid their money. There certainly may be something in the nature of a case against the exchequer for negligence.

ALDERSON, B. The bank in this case bargained for an exchequer bill right and good in all respects, not a bill which might by possibility be paid at the exchequer, although the signature to it was a forgery. Now it is clear that, in one at least of the four requisites to a good exchequer bill, namely the validity of the signature, these bills are imperfect; suppose they had been deficient in two or three of those requisites, would it still be contended that the presence of the fourth rendered them what the bank bargained for?

GURNEY, B. This is precisely similar to the case of a bank clerk getting the bank paper into his possession, and of it manufacturing a note complete in every respect except the cashier's signature, which is forged.

ROLFE, B. Supposing the defendant's proposition in this case to be correct, namely, that an action, or something in the nature of one, might be maintained against the exchequer with respect to this bill, such a proceeding would be founded, not on the principle that this was a valid bill, but on the ground that those into whose hands it came, had been misled by the conduct of the exchequer office.

Rule refused.

HENRY GOMPERTZ *v.* THOMAS BARTLETT.

IN THE QUEEN'S BENCH, NOVEMBER 14, 1853.

[*Reported in* 2 *Ellis & Blackburn*, 849.]

ACTION for money had and received. Plea: Never indebted. Issue thereon.

On the trial, before Lord CAMPBELL, C. J., at the sittings at Guildhall after last Trinity term, it appeared that the defendant, in London, sold to the plaintiff a bill of exchange purporting to be drawn at Sierra Leone by Jolly & Co., of that place, on Bellot & Co., of London, and accepted by Bellot & Co., payable to the order of a third person in London. The instrument was indorsed in blank by the payee; it was unstamped; but both parties believed it to be a foreign bill, and consequently to require no stamp. The defendant did not indorse the bill; and it was a sale without recourse. The plaintiff paid 815*l.* to the defendant, as the price of the bill, which was handed to plaintiff; and he, in like manner, sold the bill to another person, also without recourse. Before the bill attained maturity, all the parties to the bill became bankrupt. On the holder seeking to prove against the estate of the acceptor, it was discovered that the bill, though bearing the genuine signature of a Sierra Leone firm, had, in fact, been drawn by one of the partners in this kingdom, and consequently was

unavailable for want of a stamp. The Commissioners in Bankruptcy refused to allow the proof. The holder demanded back from the plaintiff the price paid to him; and the plaintiff, under threat of legal proceedings, paid him. The plaintiff now sought to recover from the defendant 81*l.*, the price of the bill, as money paid on a consideration which had failed. It was admitted that the defendant, at the time of the sale, *bona fide* believed the bill to have been drawn at Sierra Leone; and neither fraud nor negligence was imputed to him.

The Lord CHIEF JUSTICE directed a nonsuit, with leave to move to enter a verdict for the plaintiff. *Petersdorff*, in this term, obtained a rule *nisi* accordingly.

M. Chambers and *Pearson* now showed cause.

Petersdorff, contra.

Lord CAMPBELL, C. J. — At the trial, I was impressed with the consideration that this was a transaction of pure sale, and that the vendor really had title to the bill which he sold, and was perfectly ignorant of the latent defect. Besides, the bill would probably have in fact been paid had the parties to it continued solvent; and on the whole I was then inclined to think that the defect was merely one in the quality, which the vendor did not warrant. But, now, having heard the argument, I think that the action is maintainable, on the ground that the article does not answer the description of that which was sold, viz., a foreign bill. There was no written statement or direct assertion that this bill was drawn at Sierra Leone; but it purported to be so drawn; and it must be taken that it was sold by the description of a bill drawn at Sierra Leone. In fact it was drawn in London; and, on that account, it could not be enforced. If it really had been a foreign bill, any secret defect would have been at the risk of the purchaser; but this is not a case in which an article answering the description by which it is sold has a secret defect, but one in which the article is not of the kind which was sold. I think, therefore, that the money paid for it may be recovered as paid in mistake of facts. The law is, I think, accurately laid down in the passage cited from Addison on Contracts. If, being what was sold, the bill was valueless because of the insolvency of the parties, the vendor would not be answerable; but he is answerable if the bill be spurious. Jones *v.* Ryde and Young *v.* Cole are strongly in point. Young *v.* Cole is indeed a very strong case; for the things sold there as Guatemala bonds were in one sense of the words Guatemala bonds; but they were not what was professed to be sold, viz., bonds binding on the Guatemala Government. The case is precisely as if a bar was sold as gold, but was in fact brass, the vendor being innocent. In such a case the purchaser may recover.

COLERIDGE, J. I am of the same opinion. What took place at the time of the sale was merely that the vendor did not indorse the bill, and stipulated in effect that this should be a sale without warranty. That being so,

the vendor was not bound to see that he sold a bill of good quality, or to answer for the insolvency of the parties; but the vendee is still entitled to have an article answering the description of that which he bought. Here he bought, as a foreign bill, what turns out not to be a foreign bill, and therefore valueless. Common justice requires that he should have back the price.

WIGHTMAN, J. I agree upon this ground, that what was sold purported to be a bill drawn at Sierra Leone and available against the parties to it, but, so far from answering that description, was a bill not drawn at Sierra Leone, but in England, and, being unstamped, was unavailable. Wherever the article answers the description by which it is sold, and it turns out that there is a latent defect, in the absence of fraud and warranty, the vendee must take it with all faults. But this is a case in which it does not answer the description. And therefore on the authorities, more especially on that of Jones *v.* Ryde, the plaintiff is entitled to recover.[1]

Rule absolute.

(g.) There must be an unjust Enrichment of Defendant at Plaintiff's Expense.

MUNT AND ANOTHER, EXECUTORS, &c. *v.* STOKES AND ANOTHER.

IN THE KING'S BENCH, FEBRUARY 7, 1792.

[*Reported in* 4 *Term Reports*, 561.]

THIS was an action to recover 2004*l.* 3*s.* 4*d.* for money had and received by the defendants for the use of the plaintiffs as executors of A. M'Intosh: the defendants pleaded the general issue; and at the trial a special case was reserved, stating the following facts: —

In January, 1785, the plaintiffs' testator, Alexander M'Intosh, was at Calcutta in Bengal, in the East Indies, with the ship Hussar, carrying Danish colors, whereof he was at that time master and owner. By the laws of Denmark, all persons who are masters of ships belonging to Danish ports, and carrying the Danish flag, must be either natural-born subjects of the kingdom of Denmark, or become denizens of Denmark, and take the oaths of allegiance to the king of Denmark. On the 6th of January, 1785, M'Intosh borrowed at Calcutta of the defendants (being British subjects) 20,000 current rupees upon the terms mentioned in the condition of a *respondentia* bond (which was stated). The condition (after reciting that M'Intosh had taken up and received of the defendants 20,000 current rupees, making 2166*l.*, 13*s.* 4*d.* to run at *respondentia* on the ship Hussar, of which M'Intosh was the commander, and her guns, arms, ammunition, stores, etc., and also upon the goods and merchandises laden and to be

[1] Erle, J., had gone to Chambers.

laden on board during her voyage bound from Calcutta from out of the river Hoogly to the coast of Coromandel, and thence to proceed for and arrive at Copenhagen in Denmark, being to sail on the 31st of January from out of the river Hoogly, at the rate of 10*l.* per cent for the voyage) was, that if the Hussar did sail on the above voyage, and arrive at Copenhagen before the end of nine months, to be computed from the day of leaving Calcutta, when also the risk of the *respondentia* lender commenced; and if M'Intosh, his heirs, executors, etc., before the end of nine months, etc., paid to the defendants, etc., the principal sum of 2166*l.* 13*s.* 4*d.* in London, together with the premium of 10*l.* per cent for the voyage, if the same were performed within nine months, etc., and if any longer, *pro rata*: in consideration of which premium, the usual risk of rivers, violence of the seas, etc., was to be on account of the defendants; and in case of the loss of the ship, M'Intosh, his heirs, executors, etc., did within six months next after such loss, or as soon after as such average should be ascertained, pay to the defendants such average or proportion as by custom should become due on the salvage, then the obligation was to be void. A. M'Intosh soon afterwards sailed in the ship the Hussar, with Danish colors, from Calcutta to the coast of Coromandel, and there took goods on board, and from thence sailed for Copenhagen. In December, 1785, A. M'Intosh died, having first made his will, and appointed the plaintiffs and four others executors. The plaintiffs alone proved the will in the prerogative court of Canterbury. On 12th October, 1786, the plaintiffs, upon application to them by the defendants, paid to the defendants 2004*l.* 3*s.* 4*d.* in discharge of the bond so entered into by M'Intosh.

Romilly, for the plaintiffs.

Lord KENYON, C. J. (stopping Law, *contra.*) — It has been said that this was not a debt which the plaintiffs were bound in conscience to pay to the defendants: but I think that they were bound both in honor and conscience to refund the money which the defendants had advanced, though the original contract were contrary to a positive law; for this is not a penalty, but money which the defendants had actually advanced. And the original contract was not *malum in se*, but *malum prohibitum*. Though the security on which this money was borrowed was void by the statute, I do not know but that an action for money had and received might have been maintained by the defendants to recover back this money; the cases cited relative to premiums go a great way to show that. But the ground on which I go is this, that there was no misrepresentation or any improper conduct by the defendants to extort the money from the plaintiffs; but the plaintiffs, knowing the whole transaction, and the law also, as they were bound to know, voluntarily paid it. There was nothing contrary to conscience in the defendants receiving the money, which they had advanced; the plaintiffs therefore are not entitled either in law or in equity to recover it back again. This is not like a case which I remember many years ago,

where an action was brought to recover the excess of a copyhold fine: there it was held that the money might be recovered back in an action for money had and received against the steward, because he had used coercion to obtain payment of the excessive fine; he would not deliver the title-deeds without. Nor is this a case of singular hardship against the executors; for where executors pay a debt of an inferior nature, though conscientiously, and without any view to prefer one creditor to another, the loss must be borne by them individually, if the assets be insufficient to pay all the debts of a higher nature. Without going into the question of form, upon which I should be sorry to have the case decided, I am clearly of opinion that on the merits the plaintiffs are not entitled to recover.

BULLER, J. — In the case of illegal contracts, one party cannot recover against the other on the contract itself; but if he come to rescind the contract, he may recover back so much money as has been paid. This was established in Jaques *v.* Golightly, and in Lowry *v.* Bourdieu.[1] If the party come into a court of justice to enforce an illegal contract, two answers may be given to his demand: the one, that he must draw justice from a pure fountain; and the other that *potior est conditio possidentis.* Such would have been this case if the plaintiffs had not paid the money, and an action had been brought on the contract; but, the plaintiffs having paid it, the question is, whether the defendants retain the money against conscience? I think they do not, because they have only received back the money which they had before advanced to the plaintiffs' testator. I also think that the point of form is against the plaintiffs; they should have declared in their own right, and not as executors. At all events, if the action be brought by the executors, all of them should have joined; and this is a defect in the plaintiffs' title. Where indeed several are named executors, and one only proves the will and acts, that one is liable to an action; but he cannot sue alone until the others have renounced.

Postea to the defendants.

PLATT *v.* BROMAGE AND ANOTHER.

IN THE EXCHEQUER, NOVEMBER 20, 1854.

[*Reported in* 24 *Law Journal*, 63.]

THIS was an action by the plaintiff as assignee of the estate and effects of John Jones, an insolvent. The first count was in trover, for converting the goods of the insolvent before his insolvency, and the second count was for money payable to the plaintiff as assignee, for money received by the defendants, to the use of John Jones, before his insolvency. The defend-

[1] Dougl. 468, 3d Ed.

ants pleaded Not guilty, Not possessed, Leave and license, Never indebted, and other pleas.

At the trial, before WILLIAMS, J., at the Breconshire Spring Assizes in last year, the facts appeared to be these: — In October, 1850, John Jones, the insolvent, a farmer residing at Llangoed farm, in the county of Brecon, being indebted to the defendants, Messrs. Bromage & Snead, who were bankers at Brecon, in 660*l.*, for money advanced by them to him, assigned to them his stock, crops, etc., at Llangoed, by way of mortgage, for securing that sum and interest. Shortly afterwards, Jones took a smaller farm, called "Tregunter," where he continued till September, 1852, when his difficulties increasing and the debt to the defendants being unpaid, the latter, with the consent of Jones, took possession of and sold the stock, crops, etc., at Tregunter, together with a quantity of wheat, to which he was entitled as outgoing tenant of Llangoed farm. It appeared probable that the insolvent had assented to the sale of his stock and crops on Tregunter farm, under the belief that the defendants were entitled to sell it under the assignment. Under these circumstances, it was contended, on behalf of the plaintiff, that he was entitled to recover in respect of the stock, crops, etc., in Tregunter, on the ground that they did not pass to the defendants under their assignment. The learned judge reserved the point, and the defendants had a verdict, leave being reserved to the plaintiff to move to enter a verdict for him.

J. Evans now moved accordingly (Nov. 7), and renewed the objection taken at the trial.

Per Curiam.[1] We will consult the learned judge who tried the cause.

Cur. adv. vult.

POLLOCK, C. B., now said: This was a case in which a rule was moved for by Mr. Evans. The facts were of this kind: The plaintiff, as assignee of an insolvent John Jones, claimed to recover certain effects sold to pay a debt due to the defendants, who were bankers at Brecon. The defendants, Messrs. Bromage & Snead, had had assigned to them, to secure certain advances made by them, all the property in a certain farm called "Llangoed Farm;" the assignment also contained expressions sufficient to include future-acquired property; but that could not be done, the law not admitting of anything being assigned by deed, except that which actually exists. Then the defendants applied to have the security rendered available entirely with the consent of the insolvent; whereupon the property that was in the security was sold, and that not being sufficient, also a seizure was made upon another farm, called "Tregunter," entirely with the consent of the insolvent and the defendants, and this action is brought to recover in respect of so much property as did not pass by the deed between the parties. The point was reserved. We think there is no weight in the objection made on behalf of the plaintiff. If the insolvent assented to the act

[1] POLLOCK, C. B., PARKE, B., ALDERSON, B., and PLATT, B.

being done, it cannot be set aside, though it was proved that there was a mistake in point of law, or a mistake in point of fact: it is his doing, and he assented to it when it was done. There was a difference of opinion among the jury, whether or not he was under a notion that the property passed by the deed: I think it is quite immaterial whether he entertained that notion or not. There was no fraud. When a person does by some mistake that which he is in some respects bound to do, and perfectly competent to do, that cannot be treated as a fraud or as a mistake. If a man has two creditors, and, intending to pay one he by mistake pays the other, he cannot get the money back again. It appears to me and all the members of the court, that there ought to be no rule.

PARKE, B. I have consulted my Brother WILLIAMS on the matter, and he says, the consent of the insolvent to the sale of the other farm was probably influenced by the supposition on his part, that all future-acquired property, as well as all existing chattels, passed by the first assignment; and he left that question to the jury, who said they could not decide whether he made that assignment under the influence of the opinion that he was bound by the former assent. That is quite immaterial: he gave his consent uninfluenced by any fraud, and under a mistake of law; therefore, he must be bound by that mistake of law. On the question of the issue, I think the verdict was right.

Rule refused.

FRANKLIN BANK *v.* E. & H. RAYMOND.

IN THE SUPREME COURT OF JUDICATURE OF NEW YORK, AUGUST, 1829.

[*Reported in* 3 *Wendell*, 69.]

THIS was an action of assumpsit, tried at the New York circuit, in June, 1828, before the Hon. OGDEN EDWARDS, one of the circuit judges.

The declaration was on a promissory note for $497.30, dated the 12th May, 1824, made by J. H. Cunningham, payable in 90 days to E. W. A. Bailey, and indorsed by him and by the defendants, who were sued as second indorsers. The defendants pleaded the general issue, and gave notice of set-off.

The question in this case arose on the defence set up. The defendants proved that the note in question was received from Bailey in exchange for a note of the same sum and date made by the defendants to Bailey. That on the 14th June, the defendants obtained the note received of Bailey to be discounted at the Franklin Bank to their credit. Subsequently notice was received at their counting room, from the Franklin Bank, that the note given by them to Bailey was payable on the 13th August; on which day

an agent of the defendants, who had charge of their business (they being absent from the city), sent a lad to the bank with a check to pay the note. The lad returned with the note marked *paid*. The agent, discovering that it was not indorsed by Bailey, within one or two hours afterwards took it to the bank, offered it to a teller, and requested him to return the check. He was told that the note belonged to the Hoboken Bank; that it had been left by them for collection; that the amount had been carried to their credit; and that the payment could not be rescinded. The witness stated to the officer of the bank, that he could not recognize the application of the check to the unindorsed note; that the defendants had unsettled accounts with Bailey, were under responsibilities for him independent of that note, and that Bailey had died insolvent. The conduct of the agent in thus repudiating the application of the check to the payment of the note given by the defendants to Bailey, was on the same day communicated to and approved by one of the defendants. The note taken up was not produced on the trial, but its non-production was accounted for to the satisfaction of the judge. The defendants proved that the check drawn by the agent was in the names of the defendants, on funds belonging to them in the Franklin Bank, and that the same was charged to them. They further proved that Bailey was indebted to them on a promissory note, in the sum of $250, bearing date the 17th June, 1824, payable in ninety days; and in the sum of $28.27, being a book account of the date of the 1st May, 1824; and that he died insolvent before the maturity of the note lent him.

On the part of the plaintiffs, it was proved that the note taken up by the defendants was discounted before due, at the Hoboken Bank, for the accommodation of Bailey, who received the avails; that the note was delivered to the bank, but through inadvertence it was not indorsed by Bailey. Some time after the note was discounted, the cashier of the Hoboken Bank discovered that it was not indorsed, and sent to procure Bailey's indorsement; but he was either too ill to do it, or dead, at the time it was so sent. The note was deposited in the Franklin Bank for collection, and that bank, upon its being paid, credited the Hoboken Bank with the amount.

The judge charged the jury, that if they found that the note taken up at the Franklin Bank with the check of the defendants was made for the accommodation of Bailey, and given in exchange for the note declared on in this case, and that the defendants knew that Bailey's intent was to put the same into circulation, the defendants had sufficient notice to put them upon the inquiry, whether Bailey had not passed away their note; and that a delivery of the note by Bailey to the Hoboken Bank, and his receiving the amount upon discount from that bank, vested in that bank the right to the money paid into the Franklin Bank. The counsel for the defendants excepted to the charge. The jury found a verdict for the defendants. A motion was now made, on the part of the plaintiffs, to set the same aside.

R. Bogardus, for plaintiffs.

G. Griffin, for defendants.

By the Court, MARCY, J. The note given by the defendants to Bailey had not been transferred by him according to the custom of merchants. The holders of it could not therefore maintain an action upon it in their name; but Bailey had assigned it without indorsement, for a valuable consideration, to the Hoboken Bank. He had therefore parted with all his property in it, and the bank had acquired what interest he possessed in it. The holders stood in the relation of assignees of a *chose in action*, and not indorsees, and held the note subject to the equities existing between the original parties.[1] While thus situated, the defendants, under the belief that Bailey had negotiated the note, paid it to the assignees, or, which is the same thing, to their agents, the plaintiffs in this suit. After payment, the note was delivered to them, and they then discovered that it had not been negotiated, and that consequently, in the hands of the holders, it was subject at the time of the payment to a set-off to the full amount of it. They did what they could to recall the payment. They offered to restore the note, and gave immediate notice to the plaintiffs that they should not recognize the application of the money to it. If the payment was recalled, or never took effect, the amount paid was a demand that ought to be set off in this action.

It is said the defendants had a right to apply the payment to the demand for which this suit is brought. A person paying money has undoubtedly a right to apply it as he pleases; but if he does not give express direction, or the circumstances are not such as to imply a direction, the person receiving it may make the application. In this case, however, the money was applied. It was sent to the bank expressly to take up the note given by the defendants to Bailey, and for that purpose it was received. No question can properly arise as to the right of making the application by either the payees or the receivers.

The money was paid by the defendants in ignorance of their rights. Does this circumstance, connected with the acts of the defendants to rescind or disaffirm the payment when they found the note had not been negotiated, actually rescind the payment, and leave the money in the hands of the plaintiffs to be set off in this action? or, to state the question in other words, perhaps more clearly, could the defendants, after disaffirming the payment, have maintained an action against the plaintiffs for the money thus paid? The general principle of law is indisputable, that if a party pays money under a mistake of the real facts, without any negligence imputable to him for not knowing them, he may recover back such money. What sort of facts are meant? Such facts, I apprehend, as show that the demand on which the money was paid did not actually exist against the person paying at the time the money was paid. The cases collected by

[1] 13 Mass. 305.

Comyn,[1] and those referred to by Saunders, in his Treatise on Pleadings and Evidence, 675, are of this character. The case which, in my opinion, goes the farthest towards sustaining the position contended for by the defendants, is that of Milnes *v.* Duncan.[2] A bill of exchange was drawn in Ireland, on a stamp less in amount than is required for such a bill drawn in England; but there was nothing on the face of the bill to show where it was drawn. The acceptor became a bankrupt, and the holder applied to the indorser from whom he received it, to pay; but he refused, on the ground that the holder had not given notice, and had made it his own by his laches. The holder then threatened to sue for the amount he had paid the indorser for the bill, on the ground that he had passed to him a void bill, by reason of its not having the stamp required for a bill of that description. Believing that such was the fact, the indorser paid the bill, but he soon discovered that it had been drawn in Ireland, and that the stamp was sufficient, and brought his action for the sum he had paid, and recovered it. In that case it was clear that the plaintiff was wholly discharged from all liability as indorser on the bill, by the neglect of the defendant to give him notice; and that the money was paid after his liability had in fact ceased, but while he supposed it to exist, in consequence of his ignorance of the place where the bill was drawn.

The case before us is not only different, but so essentially different as to exclude, in my opinion, the application of the principle which permits money paid in ignorance of facts to be recovered back. The debt paid by the defendants was one that subsisted against them at the time of payment. The fact of which they were ignorant did not show that there was no debt existing at the time; it only showed that they were in a situation which enabled them to set off against the demand they had paid, a demand due to them from Bailey. I do not find any case where money paid on a subsisting demand has been recovered back on the ground that the person making the payment has subsequently discovered facts that show he had a set-off against the demand. It may be thought that this note, having been transferred without indorsement, was open to be impeached in the same manner as if it had remained in the hands of Bailey; and as the note which Bailey gave for it had not been paid, it was void for want of consideration; and therefore there was not in fact a subsisting debt against the defendants at the time the money was paid. The facts do not warrant this position. Cunningham's note, indorsed by Bailey, was a good consideration for the note executed by the defendants. One promise is a sufficient consideration for another. According to the principles laid down by Lord Mansfield, in Price *v.* Neal,[3] money paid by mistake or ignorance of facts, can never be recovered unless it be against conscience for the defendant to retain it. The operation of this principle destroys the defence in this case; for it will scarcely be contended that it is against conscience for the Hobo-

[1] 2 Comyn on Cont' 35, 41. [2] 6 B. & C. 671. [3] 3 Burr. 1354.

ken Bank to retain the money. The defendants gave the note to Bailey, not doubting that he would negotiate it; and on the reasonable supposition that he had done so, they paid it. The Hoboken Bank paid the amount of the note when it was transferred to them by Bailey, intending it should be, and believing it had been duly negotiated to them. By mistake it was not, and by ignorance of this mistake the note was paid. It was by a mere accident that the defendants were in a situation to avail themselves of their set-off at the time the note became due; and it was because ignorant of this accident that they failed to avail themselves of this advantage. To retain the money paid under these circumstances cannot be against conscience. I am therefore of opinion that the check was in fact applied, and was properly applicable to the note given by the defendants to Bailey, and left at the Franklin Bank for collection, and is not money in the possession of the bank for the defendants' use, to be set off against the demand for which this action is brought. There must be, therefore, a new trial. *New trial granted.*

BUEL *v.* BOUGHTON.

In the Supreme Court of New York, January, 1846.

[*Reported in* 2 *Denio*, 91.]

Error to the Onondaga C. P. Buel sued Boughton for money had and received to his use; and the case was substantially as follows: One Charlotte Smith held a bond against the plaintiff for $2650, payable in six equal annual instalments, with annual interest from April 1, 1843. James H. Fuller, in right of his wife, owned and had an interest in the bond to the amount of $498.10. On the first day of April, 1843, the plaintiff gave James H. Fuller his negotiable promissory note for said sum of $498.10, having more than two years to run. The plaintiff agreed to make the note payable with interest; but interest was left out of the note by mistake in drawing it. On the day of the date of the note Charlotte Smith indorsed and receipted the amount of the note on the bond. On the day the note was given, James H. Fuller transferred it to Almerin Fuller, who indorsed the amount of the note on a bond which he held against James, which bond was on interest. This was done on the supposition that the note was also on interest. About twenty days afterwards Almerin Fuller transferred the note to the defendant, who indorsed the amount of the note, and of the interest which was supposed to have then accrued upon it, on a bond which he held against Almerin Fuller, which bond was on interest. On the 23d of May, 1845, the plaintiff paid the note to the defendant, and by mistake, supposing the note to have been written with interest, paid the defendant $71.20 for interest on the note, and took it up. The plaintiff

brought this suit to recover back the sum so paid by mistake for interest. The defendant set up the other facts which have been mentioned as an answer to the action; and the court decided in his favor. A verdict and judgment having passed for the defendant, the plaintiff now brings error on a bill of exceptions.

G. W. Noxon, for the plaintiff in error.

Noxon, Leavenworth and *Comstock*, for the defendant in error.

By the Court, BRONSON, C. J. This is a remarkable case. The plaintiff first omitted, by mistake, to make the note payable with interest, as he should have done; and then, by another mistake, he corrected the first error by paying interest, when the note itself imposed no such obligation. And thus by two blunders the parties have come out right at last. Or at least, the plaintiff has paid no more than he ought to pay; and there would be no ground for an action to recover back the money paid for interest, if the payment had been made to James H. Fuller, the payee of the note, against whom the first mistake was made. One party would in that case have paid, and the other received just what in justice and honesty ought to be paid and received.

But the payment was not made to James H. Fuller; and this leads me to notice that not only the plaintiff and James H. Fuller acted from beginning to end under the mistaken supposition that the note was made payable, as it should have been, with interest; but the note was twice transferred, and both Almerin Fuller and the defendant took it under the same mistake of supposing it carried interest. Now as against the plaintiff, James H. Fuller had an equitable claim to have the mistake corrected, so as to give him interest on the debt. Then Almerin, having taken and paid James for the note as though it were on interest, had an equitable claim to have the mistake corrected, so as to give the interest to him. The same thing is true as between the defendant and Almerin. The defendant took and paid him for the note as though it carried interest. And thus by a series of mistakes the equitable claim to interest which was originally in James, passed from him to Almerin, and from Almerin to the defendant; so that, at the time the money was paid, the defendant was the person who was equitably entitled to receive it. He could not have sued the plaintiff for it at law in his own name; but in a court of equity the money would have been awarded to him, and not to James H. Fuller. It has come into the defendant's hands without suit, and from the person who ought to pay it; and I see no sufficient reason for requiring it to be refunded. Whether the defendant could sue at law in his own name to recover the money; or whether, having fairly got it, this action for money had and received to the plaintiff's use can be maintained, are very different questions. This is an equitable action, which may be defended upon the same equitable principles as those upon which it is maintained. As a general rule, the question is, to which party *ex æquo et bono* does the money belong; and in this

case, I think it belongs to the defendant, who has got it. Let us suppose that the plaintiff had refused to pay the interest to the defendant; but, being liable to pay it to some one, he had paid it, either voluntarily or by compulsion, to James H. Fuller, between whom and the plaintiff the original mistake was made. James might then have been compelled to pay the money to Almerin; and Almerin to the defendant. Or if we begin at the other end, the defendant might have fallen back upon Almerin, and compelled him to correct the mistake by paying the interest; Almerin could have gone back in like manner upon James; and James upon the plaintiff. And so in any way of viewing the matter, the plaintiff was bound in equity and good conscience to pay the money; and the defendant was the man who in equity and good conscience was entitled to receive it. He has got it; and to allow the plaintiff to recover it back, would be to make this the first in a circuit of four actions which would end in leaving the money just where it was at the beginning.

It is said that although the plaintiff has paid the interest to the defendant, he may be compelled to pay it again in an action on his bond to Mrs. Smith. But I think not. It fully appears that the principal sum of money for which the note was given belonged to James H. Fuller; and of course he was entitled to the interest which should afterwards accrue on that sum. If the indorsement made on the plaintiff's bond would not of itself preclude Mrs. Smith from recovering the interest in question, it would clearly be enough to show in addition, that the plaintiff had corrected the error by paying the interest. But if the plaintiff should succeed in recalling the money, then undoubtedly Mrs. Smith, on proving the mistake in giving the note, and that the plaintiff had not corrected it, might recover this interest for the benefit of James H. Fuller. But by leaving the money where it is, the whole series of mistakes will be corrected, and all parties, unless it be the plaintiff, will be satisfied. *Judgment affirmed.*

HUBBARD *v.* CITY OF HICKMAN.

IN THE COURT OF APPEALS OF KENTUCKY, OCTOBER 9, 1868.

[*Reported in* 4 *Bush*, 204.]

Randle and *Tyler*, for appellant.

John Rodman, for appellee.

Judge ROBERTSON delivered the opinion of the court.

The appellant brought this action against the appellee for reclamation of one thousand five hundred dollars which, through alleged mistake of law, he had, for ten consecutive years, paid, at the rate of one hundred and fifty dollars a year, under an assessment by the municipality of his *choses in action* for local taxation.

The answer insists that the tax was legal, — avers that the appellant, all the time, was a municipal officer, approved and aided in the enforcement of the like taxation on others, and once as councilman voted to impose it; and, alleging that he failed to list at least eighty thousand dollars of *choses in action*, the appellee therefore asserted a counter-claim for the surplus improperly pretermitted. On a demurrer to the answer, the circuit court, reverting to the petition, adjudged it insufficient and dismissed it.

The fourth and fifth sections of the act of 1854,[1] like the charter of the city of Lexington, authorized the city to assess "all the real and personal estate of the city;" and, in the case of Johnson *v.* The City of Lexington,[2] this court exonerated Johnson from the payment of a municipal tax imposed on his *choses in action.*

That case and this differ in two respects. 1st. Johnson resisted payment. The appellant, after ten years, seeks to recover back what he voluntarily paid. 2d. The charter of Lexington did not contain the following provision of the act of 1854: "In making assessment for the railroad tax, all property taxed shall be given in under the same rules and regulations required in giving in taxable property for State revenue."

Whether this supplement was intended to adopt the equalization law of the State, or meant only to fix the mode of listing "real and personal estate," is a rather vexatious question, which we will not decide in this case, as we would be compelled to do had not the appellant paid the tax as and when he did. Having so paid it, has he a conscientious claim to restitution, so far as not barred by limitation? And is there any implied promise to pay it back? We think not.

It is difficult to prove a mistake of law, or that it was the only reason for payment; and it is neither alleged nor sufficiently proved that a mistake of law was the appellant's only motive for so long paying the tax. We may presume other and higher motives, whatever he may have thought of his legal obligations.

But, as the appellant helped to impose the tax, and otherwise ratified it, he was under an honorary obligation to his fellow-citizens, who, therefore, paid their portions of it, to contribute his share of the self-imposed burthen.

A payment of a debt barred by limitation can never be recovered back on a plea of mistake of law or of fact.

There was an honorary obligation to pay, and the law would rather presume that, therefore, payment would have been made had there been no mistake as to the bar. So here, and especially as the appellant paid only what he induced others to pay, whom therefore it was his duty to help, and also as the payment relieved other property of increased taxation.

We are therefore of opinion that the law, on the facts exhibited, does not imply a promise of restitution, and the judgment is therefore affirmed.

[1] Session Acts, p. 561. [2] 14 B. Mon. 648.

ISAAC JACKSON, RESPONDENT, *v.* HORACE F. McKNIGHT, APPELLANT.

IN THE SUPREME COURT OF NEW YORK, JANUARY TERM, 1879.

[*Reported in* 17 *Hun*, 2.]

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee.

The action was brought to recover money alleged to have been paid to the defendant under a mistake of fact.

John B. O'Malley for the appellant.

James C. Miller for the respondent.

LEARNED, P. J. On the 23d of March, 1875, the defendant was the assignee and owner of a bond and mortgage executed by the plaintiff, which had become payable several years before. The interest had been payable annually on the tenth of September, and it had in fact been paid up to September 10, 1874. On the day first mentioned, the defendant stated to the plaintiff that $230 of interest, payable September 10, 1874, were unpaid, and the plaintiff thereupon paid the defendant $230 for such interest, not remembering, at the time, that the interest had been paid to that date. In January, 1876, the defendant assigned the bond and mortgage. After a lapse of two years the plaintiff sued to recover back this money as overpaid by mistake.

The difficulty is that, at the time when the plaintiff made this payment, he was owing the defendant a much larger amount, overdue and payable on the very obligation upon which this payment was made. Clearly, if the plaintiff had handed the defendant $230 to apply on the bond and mortgage, he could not have recovered that sum back. But in this present case he claims to recover, because it was intended as a payment of interest which had, in fact, been paid; and not as a payment of principal, which had not. The payment, however, was really made on the debt. The plaintiff is, and always will be, entitled to a credit for so much paid thereon. The defendant and the defendant's assignee can enforce the bond and mortgage only for what is payable, after crediting this and all other payments. In fact, over six months' interest had accrued at the time when this money was paid, payment of which (it would seem) might have been demanded, the principal being overdue. And further, after this money was paid and before the suit was commenced, even before the defendant assigned the bond and mortgage, interest accrued on the bond and mortgage more than this amount. How any subsequent payments were made is not shown.

The action to recover money paid by mistake is sustained, because otherwise the party would suffer an unjust loss. It should not be extended to

cases where the relief is not necessary. It is not necessary in the present case, because the plaintiff can protect himself whenever he is sued on the bond and mortgage. Perhaps, in such suit, the holder of the mortgage may voluntarily give the plaintiff the credit to which he is entitled for this payment. Any questions between the defendant and his assignee, as to the defendant's liability on the assignment, they must settle among themselves.

The judgment should be reversed, a new trial granted, the reference discharged, costs to abide the event.

Present — LEARNED, P. J., BOARDMAN and BOCKES, JJ.

Judgment reversed, new trial granted, reference discharged, costs to abide event.

(h.) When a Demand is necessary.

FREEMAN *v.* JEFFRIES.

IN THE EXCHEQUER, MAY 6, 1869.

[*Reported in Law Reports* 4 *Exchequer*, 189.]

ACTION for money had and received. Plea: Never indebted. Issue.

The plaintiff being about to become tenant of a farm held by the defendant under a lease which would expire in the following year, the plaintiff and defendant on the 17th of July, 1868, entered into an agreement in the following terms: —

"First, the said J. S. Jeffries, by and with the consent of Sir George Broke Middleton (the landlord), has conveyed and assigned, in consideration of the sum of 2000*l.*, unto the said T. Freeman all his interest in the farm known as Alnesbourne Priory, etc., together with all the growing crops as now standing upon the land, or as already harvested and secured, all the covenants and general valuation of the farm, all the live stock consisting of the flock of black-faced ewes, twenty-five scores, not more than three and a half scores to be crones, and sixteen agricultural horses, also all the dead stock as generally used upon the said farm."

Secondly, the defendant was to harvest the crops, pay rent, etc., till Michaelmas, and if he should be prevented from fulfilling his contract was to refund the 2000*l.* already paid, with interest. "It is further agreed between the said J. S. Jeffries and the said T. Freeman, all the aforesaid matters and things are to become a subject of valuation by two indifferent persons, one to be chosen by each party, and in the event of their not agreeing, then by their referee or umpire, whose decision shall be final and binding on both parties. It is further agreed between the aforesaid par-

ties that after the valuation is made and the award prepared, the remainder of the money shall be made payable to the said J. S. Jeffries on the 1st day of November next by note of hand."

The 2000*l.* was paid at the time of making the agreement; the valuers named by the parties completed their valuation, which was handed by the defendant to the plaintiff on the 21st of July; and with the valuation, which was for a lump sum, there was also given to the plaintiff an inventory of the items valued. On the 23d of July the plaintiff and defendant went over to the farm, and on their return the plaintiff gave the defendant his promissory note, payable on the 1st of November, for 3319*l.*, the difference between 5319*l.* the amount of the valuation, and 2000*l.*, the sum paid down on signing the agreement.

The plaintiff remained in possession of the farm till the following Michaelmas, and then sold his interest in it to a Mr. Packard. On the occasion of the sale the farm was revalued. It was then discovered (as the plaintiff alleged) that several items had been included in the valuation to him which ought not to have been so included; but no complaint whatever with respect to the valuation was made by him to the defendant until the end of October, and then no intimation was given of the nature of the grievance complained of.

On the 1st of November the plaintiff paid the amount of his promissory note to the defendant, in whose possession the note had remained without being negotiated, and in December commenced this action.

At the trial before BRAMWELL, B., at the Essex spring assizes, 1869, evidence was given to the effect that certain items had been improperly included in the valuation to the plaintiff. These items were of two sorts, of each of which certain specimen items were taken as representative. The first specimen item was "groundage," an allowance made in some districts by the custom of the country to the outgoing tenant, in consideration of his not feeding or turning stock on to land sown with young seeds, but which, it was alleged, was not allowed by the custom of the country where the farm was situated. The second item was "pea stubbles, 25*a.* 3*r.* 33*p.* tillage and seed to same;" as to this it was said that the same thing was charged twice over, once as tillage and seed, and afterwards as a crop. A verdict was taken for the plaintiff, with leave to the defendant to move to enter a verdict for him, the amount to be ascertained by an arbitrator, in case the judgment of the court should be in favor of the plaintiff. A rule having been obtained accordingly,

J. Brown, Q. C., Sir *George Honyman*, Q. C., and *Finlay* showed cause.

Hawkins, Q. C., and *Philbrick*, in support of the rule, were not called upon.

KELLY, C. B., after stating the facts of the case and the terms of the agreement, proceeded: The plaintiff brings this action to recover either the whole sum of 5319*l.*, or the 2000*l.* paid on deposit, or the remaining 3319*l.*, or an undefined sum which the jury may find to be the value of those items

which ought not to have been included in the valuation. At the trial various items were specified and agreed upon, which were admitted, or which were to be assumed, to represent fairly the plaintiff's objections. These items are of two kinds. The first are those which, by the custom of the country, ought not to be included in the valuation. This raises the question whether, under the agreement, power was not given to the valuers to determine what the custom of the country was, and to apply it to the circumstances. In my opinion they had that power. If, then, we were to suppose a jury satisfied that some items were included which ought by the custom to have been excluded, yet the plaintiff cannot recover, for the question was left to the determination of the valuers, whose decision was final.

The second class of items may rest on a different principle. Here it is said the valuation contains cumulative charges, one for a crop, and another for the seed from which it was raised. It may even here, however, be doubtful whether the question is not one of the custom of the country, and one therefore falling within the same principle as the first. But, assuming it to be otherwise, it is still a question whether, on a view of the fields and what was growing there, the valuers were not at liberty to consider whether both stubble and seed should not be included in the valuation. Therefore, looking at the nature of the items, and admitting that there may have been others of larger amount but of the same character, it is not competent to the plaintiff to object to the valuation ; but the determination of the valuers is conclusive against him, as it was against the defendant. On these grounds I am of opinion that the rule must be made absolute.

But I must add that if the case were, as was put in argument, that the valuers had manifestly included something which they had no jurisdiction, right, or power to include, as for instance, a field of several acres with a crop of wheat upon it belonging to another owner, I think the action would still, under the circumstances, not be maintainable. For we must in this action consider the conduct of the parties before, at the time of, and after the valuation, the acts done between the two, and the acts done separately by the plaintiff and not communicated to the defendant. Everything goes on regularly till the 21st of July, when the defendant produces the inventory and valuation, and delivers it to the plaintiff, who accepts and receives it. On the 23d the parties go together over the farm, when the plaintiff might have compared the inventory with the stock and crops, and seen whether it contained anything which ought not to have been included. But he did not do so. He accepted the inventory and delivered to the defendant the promissory note for the amount of the valuation according to their agreement. Now if a question had then been raised as to the correctness of the valuation, and an error had been discovered, steps might have been taken to rectify it before the condition of the parties was altered, But the plaintiff, having received the inventory, and with full means of in-

quiry, offers no objection and makes no inquiry, but takes possession of the farm, stock, and crops. Here again he had an opportunity of going through the valuation on the spot; but he does not do so; and it is not until after he has paid the promissory note on its becoming due in November, that, having previously, and on the occasion of his selling his interest in the farm, discovered, as he alleges, that a mistake had been made in the valuation, he commences this action. Now, suppose a mistake had been made in fact, and that too, of an important kind, such as that a field not belonging to the farm had been included, the plaintiff's duty would have been to go at once to the defendant and claim a deduction, and (as the items had not been separately estimated) that the valuers should revise the inventory and valuation, and determine how much ought to be allowed. I put the question to Mr. Brown whether the valuers, having once made their valuation, were *functi officio*, or whether it was still open to them to make a new valuation. He agreed that if the valuation, on such a ground, was erroneous, the valuers would be entitled to make a new valuation, and the true and correct amount being thus ascertained, the excess, he contended, and perhaps with reason, might be recovered back. This, however, was not done in fact. No notice was given to the defendant or to the valuers of any alleged error, nor was any opportunity afforded him or them of examining into the matter. On the contrary, the defendant was led to believe, and did believe, that the valuation delivered was a correct, final, and conclusive estimate, and he received no notice to the contrary until after the promissory note had been paid, and it was impossible to reinstate the parties in their previous condition. Clearly, then, the plaintiff cannot recover back the whole sum of 5319*l.*; nor can he recover the 2000*l.* paid on deposit, for it was paid, not under the valuation at all, but in pursuance of the agreement. Can he then, thirdly, recover back the 3319*l.*, or that sum whatever it was which he paid, as he alleges, under a mistake? Certainly he cannot. Assuming even (though without conceding it) that the valuation was incorrect and void, and that, if the money had not been paid, an action against the plaintiff for the 3319*l.* must have failed, yet the plaintiff cannot, under the present circumstances, recover; for, in the first place, it was paid, not in consequence of the valuation alone, nor because a specific sum was fixed by the valuation; but the consideration for it was the sale and delivery of the farm, stock, and crops, which having been in fact delivered over to the plaintiff and being in his actual possession, no such failure of consideration has taken place as will entitle him to recover the sum paid, as if a mistake had been committed applying to the whole matter. This is an equitable action, and will only lie when it is inequitable in the defendant to retain the money which the plaintiff claims; but, so far from that being the case here, it would be most inequitable to allow the plaintiff to take it away. The plaintiff was bound before he could call on the defendant to repay any money at all, and whilst it was yet practicable to correct the alleged error,

to give full notice of it to the defendant, and afford him the opportunity of investigating the claim and rectifying the valuation. It was in his power to do so, for he was still in possession of the farm. But having thus the means of bringing the question between himself and the defendant to a just and satisfactory settlement, he gives no intimation of any objection to the valuation, allows the defendant to suppose that the matter is concluded, and then, with full knowledge of all the circumstances on which he now founds this action, he parts with the farm, thus rendering it impossible for the valuers or the defendant, or himself even, to enter the farm and inspect the stock and crops for the purpose of reconsidering the valuation. He pays the promissory note, still without objection, and finally, and without a demand made, in December he commences this action. It is therefore not inequitable for the defendant to retain this money, for he has received it *bona fide* as the price of the stock and crops which he has delivered over to the plaintiff according to his agreement, and of which he has no means of repossessing himself.

It appears to me, therefore, that this case does not come within the principle upon which the action for money had and received, to recover money paid by mistake, is maintainable. That principle is clear and simple in the extreme. No man should by law be deprived of his money, which he has parted with under a mistake, and where it is against justice and conscience that the receiver should retain it. If A. pay money to B., supposing him to be the agent of C., to whom he owes the money, and B. be not the agent, it may be recovered back again. If A. and B. are settling an account, and make a mistake in summing up the items — A. pays B. 100*l.* too much — he may recover it back again. So, *exempli gratia*, in one of the many decided cases on this point, where an attorney's clerk had paid a sheriff 10*s.* 6*d.* demanded as of right for three warrants, believing that sum to be due, and 4*d.* for each warrant only was the proper sum, the attorney was held entitled to set off the difference, as money had and received in an action brought against him by the sheriff. Dew *v.* Parsons.[1] But in all these cases, not only was the money paid under a mistake by the party paying it; but the retaining of the money by the receiver was against equity, justice, and good conscience. Here, however, there was no mistake on the part of the plaintiff. He paid the amount at which the valuers had in truth and in fact assessed the property valued: and the mistake, if any, was theirs, and he and not the defendant had the means of enabling them to rectify their error. On the other hand, not only was it not against equity and good conscience in the defendant to retain the money, at least until the account could be fairly adjusted between him and the plaintiff, but it would have been manifestly unrighteous and unjust that the plaintiff, having received possession of the property for which the money had been paid, having sold it for a large sum of money which he had also re-

[1] 2 B. & A. 562.

ceived, and thus knowingly deprived himself and the defendant of the means of rectifying any error which might have been committed, or of reinstating themselves in their original condition, should be permitted by law to recover back the money he had so paid, thus taking to himself at once the property and the price of it, and leaving the defendant to his legal remedy, after depriving him of all means of practically enforcing it.

Further, it appears that the promissory note was still in the hands of the defendant at the time of the payment of the money by the plaintiff in November; and inasmuch as the plaintiff then had full knowledge of all the facts of which he alleges that he was ignorant when he gave the promissory note, and upon his ignorance of which his present claim is founded, I am of opinion that this was a voluntary payment made with knowledge of all the facts, and on that ground also the money cannot be recovered back in this action.

For these reasons I think that the verdict for the plaintiff should be set aside, and the rule made absolute to enter the verdict for the defendant.

MARTIN, B. I also think this rule must be made absolute. It is clear this action is not maintainable without a demand, that is, an intimation from the plaintiff to the defendant that the money which has been paid was paid under such circumstances as render a part or the whole recoverable back. I think this is clear, and I am prepared to give judgment on this point alone. The action is at common law; and I only know of two kinds of common-law actions; one for injury to person or property, and the other for breach of contract. Now, the ordinary case of breach of contract is, where both parties have agreed to a certain thing, and one breaks the promise which he has made. But for a long time implied contracts have been admitted into the law, where, a transaction having taken place between parties, a state of things has arisen in reference to it which was not contemplated by them, but is such that the one party ought in justice and fair dealing to pay a sum of money to the other. Now, a state of circumstances has (it must be assumed) arisen here which was not in the contemplation of either party, and which it is insisted raises an implied contract in the defendant. To judge whether this is so we must look at the circumstances. The parties have entered into an agreement for the sale of the defendant's interest in the farm, stock and crops, for an entire sum to be put on it by two valuers, and of which 2000*l.* was paid down. It was the duty of the valuers to determine what was, according to the custom of the country, to be paid by an incoming to the outgoing tenant. They had no difference requiring the appointment of an umpire, but make an award, as to which it is ridiculous to suppose that any extravagant or considerable error has been committed and passed over by the plaintiff's valuer against the interest of his employer. A promissory note is given for the amount of the valuation according to the agreement, and is paid; the plaintiff enters into possession of the farm; he again sells his interest, and so ceases

to be able to return to the defendant what he had got from him; and now, the valuer on this sale having discovered what he thinks to be a mistake (and what we must suppose to be such) in the former valuation, the plaintiff without notice brings an action against the defendant to recover the whole sum which he has paid under that valuation. We are asked to treat the whole affair as a nullity, and are told that this is the essence of justice. But the effect contended for could only be produced by a rescission of the contract, and the contract cannot be rescinded unless the parties can be restored to their original condition. But if one party has done an act by reason of which it has become impossible to put the other in the same situation as before, there can be no rescission, and the remedy, if any, must be on the contract. It is contended that under these circumstances, a contract will be implied to return the money; but I am not of that opinion. If an action lies for recovering the money paid for those items which ought not to have been included in the valuation, it would be an action for the return of a portion of the money paid, on the ground that the consideration had failed, and after notice given that it had failed. But unless some communication has been made by the plaintiff, he is not entitled to recover either the whole or any part of this sum. On the ground, therefore, that the plaintiff is not in a position to sue without having made a demand on the defendant, I am of opinion that this rule must be made absolute.

Bramwell, B. I give no opinion on many of the questions which have been discussed; but on the ground I am about to mention I think this rule must be made absolute. The plaintiff's case is this: "I have paid money which I was not bound to pay, and which, if I had known facts which I now know, I should not have paid. I paid it on the footing of a valuation having been made, when, in fact, no valuation had been made; neither a valuation including in distinct items the matters which were to be valued, nor a valuation in general of the whole of the items for which I ought to pay." But if the plaintiff were under the circumstances entitled to be repaid the sum he claims, he ought to have given notice to the defendant of the facts by reason of which he was so entitled; because until he did so there could be no duty on the defendant to pay it over. Put the claim of this action, which is in the technical form of an action for money had and received, in a rational way, and it amounts to this. The plaintiff says, "I, in the belief that a certain valuation had been made, paid certain moneys to you; I have since found that the valuation was not made, I therefore say there is a duty on your part to repay me." Would the duty of repayment arise until this notice was given? I apprehend not; for at what other time could it have arisen? Not at the moment when the money was paid; for it was paid with the intention that the defendant should keep it. Was it, then, at the moment when the mistake was discovered? This would be most unjust; the mistake was the plaintiff's, and the discovery is the plaintiff's, and the defendant may still think that

everything is right, and that no mistake at all was committed. Therefore, until notice no duty would arise, and therefore no cause of action. The argument of Sir *G. Honyman* as to the duty of knowledge is against him; for, where in this case, is the duty to communicate knowledge? Clearly in the plaintiff. Let me suppose the case that the plaintiff had brought against the defendant an action of trover or detinue for the promissory note. It is admitted that the plaintiff could not have established his cause of action without some demand; for how could there be a wrongful detention until some claim was made? If this is so, how can money paid be demanded back by an action without previous notice? Suppose I hand over money to some one to take care of, without the obligation of retaining it in specie (and I do not include circumstances constituting the relation of banker and customer), I must give notice to him that I want it back before he is indebted to me, or is under any present duty in respect of it. It is contended that no demand is necessary where there is already a cause of action. But this is begging the question; for the contention on the other side is, that there can be no cause of action till demand; and the case of Wilkinson *v.* Godefroy[1] is an authority in favor of that position. Therefore, on this ground alone, without saying anything of other grounds, the plaintiff cannot succeed, he not having done that which was necessary to entitle him to maintain an action for money had and received.

PIGOTT, B. I am much struck with the observations which my learned Brothers have made as to the necessity of a demand to entitle the plaintiff to maintain the action, and I am disposed to acquiesce in their view; but I prefer to rest my judgment on the nature of the agreement between the parties. This valuation was in substance an award between an outgoing and an incoming tenant, and the subject-matter of it is all the defendant's interest in the farm, that is, everything which the custom of the country would give to him as against his landlord. Now, if we look at the transaction with reference to these circumstances, no doubt it was not in the contemplation of the parties that the plaintiff should pay for what he did not get; but it was in the contemplation of the parties that the valuers should determine what was the custom of the country, and what was to be paid according to it, and it was contemplated that there might be differences of opinion, and even some errors in the valuers. But it was not contemplated that for some slight errors the whole transaction should be ripped up and rescinded; and that when everything was swept away, and the whole surface of the farm changed, a question which has thus become impossible of determination should be transferred from an examination under favorable circumstances, and by a convenient tribunal, to a trial before an inconvenient tribunal and under most unfavorable circumstances. This would be not justice but a great wrong to the defendant. It is plain that the parties intended the whole matter to be left to the valuers, with

[1] 9 Ad. & E. 536.

the chance of such error as they might make, but with power to determine what should finally be due. There was, therefore, no mistake of fact in the plaintiff, who paid upon a valuation which was actually made, but the mistake if any was the mistake of the valuers.

Rule absolute.

JAMES SHARKEY, APPELLANT, *v.* LUTHER E. MANSFIELD, RESPONDENT.

IN THE COURT OF APPEALS OF NEW YORK, OCTOBER 17, 1882.

[*Reported in* 90 *New York Reports*, 227.]

APPEAL from judgment of the General Term of the city court of Brooklyn, entered upon an order made October 1, 1880, which affirmed a judgment in favor of defendant, and affirmed an order denying a motion for a new trial.

This action was brought to recover a balance alleged to be due for work and material in building a stone pier in the Gowanus canal.

Plaintiff claimed that the work, save some extra work, was to be done for a gross sum, and that no price was fixed for the extra work; defendant claimed the agreement to be that the work should be paid for at a specified price per cubic yard. He set up as a counter-claim an over-payment made through mistake on his part as to the quantity of the work done, which mistake was not discovered until a measurement was made after the suit was commenced, which was in 1878. Plaintiff proved that his bookkeeper presented to defendant a bill for the work as claimed by him in 1872, and that thereafter defendant made payments thereon.

N. H. Clement for appellant.

Tracy, Catlin and *Hudson* for respondent.

FINCH, J. This is not a case of money paid under a mutual mistake, where the action of each party was equally innocent. The mistake was that of the party who paid, and not at all that of the one who received the amount in dispute. The plaintiff was employed by the defendant to build a stone pier in the Gowanus canal. The precise terms of the contract, and the amount due for construction were sharply litigated on the trial; but the verdict of the jury establishes that there was an over-payment mistakenly made by the defendant. His right to recover back is resisted, mainly upon the ground that notice was not given and demand made of the over-payment, before setting up the counter-claim. Without stopping to consider whether the same rule applies to a defendant pleading an over-payment by way of counter-claim, as that which governs a plaintiff suing for the same cause, and assuming the law to be identical in both cases, we are still of opinion that a demand was not a condition precedent to the defendant's right of action. Two cases in this court are relied upon by the appellant.

The Mayor *v.* Erben;[1] Southwick *v.* The First National Bank of Memphis.[2] In the first of these cases no mistake was established, and that fact decided the case. The court added, "where money is paid under mutual mistake," demand, or at least notice of the error, must precede a right of recovery. In the later case, the mistake was mutual, and stress was laid upon the fact that the defendant "lawfully and innocently received the draft and the money thereon." The ground of these decisions is quite obvious. Where the mistake is mutual, both parties are innocent, and neither is in the wrong. The party honestly receiving the money through a common mistake owes no duty to return it until at least informed of the error. It is just that he should have an opportunity to correct the mistake, innocently committed on both sides, before being subjected to the risks and expenses of a litigation. It was said in Abbott *v.* Draper,[3] that "when a man has paid money as due upon contract to another, and there is no mistake, and no fraud or other wrong on the part of the receiver, there is no principle upon which it can be recovered back until after demand has been made." While this language is not accurate as to a mistake on the part of the receiver, if that was the meaning intended, the doctrine is clearly recognized that where the receiver is guilty of fraud or other wrong in taking the money, he is not entitled to notice. The necessity of a demand does not, therefore, exist in a case where the party receiving the money, instead of acting innocently and under an honest mistake, knows the whole truth, and consciously receives what does not belong to him, taking advantage of the mistake or oversight of the other party, and claiming to hold the money thus obtained as his own. In such case he cannot assume the attitude of bailee or trustee, for he holds the money as his own, and his duty to return it arises at the instant of the wrongful receipt of the over-payment. He is already in the wrong, and it needs no request to put him in that position. The Utica Bank *v.* Van Gieson;[4] Andrews *v.* Artisans' Bank;[5] Dill *v.* Wareham;[6] Southwick *v.* First National Bank of Memphis.[7]

This case is of that character. The receiver was not innocent. If he did not perpetrate a fraud, at least he committed a wrong. He knew all the facts and must be assumed to have known the law. He went to trial not admitting a mistake, but insisting that there was none. He charged a price beyond that to which he was entitled, or for quantities which were exaggerated, and obtained the money through the inadvertence and mistake of his debtor, who had not measured the work. He did not come rightfully by the excess. He took it as his own money, conscious of all the facts, and not only claimed to hold it as such, but sued to recover more. The case is not one in which he owed no duty until apprised of his mistake, for he made none. He took what was not his, knowing all the facts, and at the

[1] 3 Abb. App. Dec. 255. [2] 84 N. Y. 420, *supra*. [3] 4 Den. 53.
[4] 18 Johns. 485. [5] 26 N. Y. 299. [6] 7 Met. 447.
[7] 84 N. Y. 430.

moment of its receipt it was his duty to return it. The action for money had and received could be at once maintained.

The appellant further relies upon the facts of the presentation of his bill and a payment thereafter, made by the defendant, and also upon the lapse of time during which the bill remained unchallenged. These circumstances he insists amounted to an admission of the correctness of the bill. They tended to that result, but were not conclusive. They were met by the defendant's evidence of mistake and his explanation consistently therewith. The facts relied on and the explanation given were submitted to the jury and they have determined the question. We discover no just ground for reversing the recovery.

The judgment should be affirmed, with costs.

All concur, except TRACY, J., taking no part.

Judgment affirmed.

JOHN H. STURGIS *v.* JONATHAN PRESTON.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, MARCH 1, 1883.

[*Reported in* 134 *Massachusetts Reports*, 372.]

COLBURN, J. In this case, the plaintiff contended, and offered to prove that in the year 1871 he bargained with the defendant for a lot of land, for a certain sum a square foot; that the defendant stated the number of square feet in the lot; that the plaintiff relied wholly upon the defendant's statement, and had no reason to believe or suspect that there was any error in said statement; that he thereupon paid for the land accordingly, and took a deed thereof; that there was not the number of square feet of land in said lot that the defendant had represented; that he did not discover the deficiency until the year 1880, a short time before this action was brought, when he was preparing to build upon the lot; that immediately upon the discovery of the mistake, he notified the defendant thereof, and demanded repayment of the sum so overpaid, and brought this action to recover it. The plaintiff disclaimed all charges of fraud or fraudulent concealment on the part of the defendant.

One of the counts in the plaintiff's declaration was for money had and received. The defendant relied, as one defence to the action, upon the statute of limitations.

The plaintiff contended that an action for money had and received has always been treated, at common law, as being founded on equity, and that the decision in this case, whatever it ought to be, should be the same, whether it should be considered a decision at common law or in equity; and argued that, as in equity, in cases of mistake, the statute of limitations

does not begin to run until the discovery of the mistake, this action is not barred by that statute.

The answer to this argument is, that, although an action for money had and received, in its spirit and object, resembles a suit in equity, it is still an action at law, within the statute of limitations; and, as all charges of fraudulent concealment are disclaimed, it is not within any exception to the statute.[1]

The Commissioners on the Revised Statutes, in their note on c. 120, § 11, say: "In many cases of implied assumpsits, and other suits on contracts, the cause of action may remain for a long time unknown to the plaintiff; but unless that knowledge was fraudulently concealed from him, it was never supposed that he could bring his action after the expiration of six years." See also Adams *v.* Ipswich;[2] Bishop *v.* Little;[3] Bree *v.* Holbech;[4] Banning on Limitations of Actions, 21. Indeed, under the facts in the case at bar, it would seem that, even in a suit in equity, the plaintiff's claim would be barred; Farnam *v.* Brooks;[5] but we have no occasion to decide this point.

The plaintiff further contended that his right of action did not arise until after demand, which was not made until 1880, and that, for this reason, this action is not barred by the statute of limitations.

We are of opinion that the plaintiff's cause of action arose immediately upon the payment of the money, and that no demand was necessary. If the plaintiff should sustain his offer of proof, the defendant held, and claimed as his own, from the moment it was paid to him, money which in equity and good conscience he ought to have immediately repaid to the plaintiff. Dill *v.* Wareham;[6] Earle *v.* Bickford;[7] Utica Bank *v.* Van Gieson;[8] Hawley *v.* Sage.[9]

This case differs widely from those in which the defendant is in the rightful possession of money, making no claim to it as his own, but ready to pay it over to the rightful owner; in which it is held that no right of action arises, and that the statute does not begin to run until after a demand upon him by the party entitled to the money, and a refusal to pay it over to the rightful claimant. French *v.* Merrill;[10] Jones *v.* McDermott.[11]

Judgment for the defendant.

J. P. Treadwell, for the plaintiff.

T. P. Proctor (*E. Tappan* with him) for the defendant.

[1] Gen. Sts. c. 155, §§ 1, 12.
[2] 116 Mass. 570.
[3] 3 Greenl. 405.
[4] Doug. 630.
[5] 9 Pick. 212, 245.
[6] 7 Met. 438.
[7] 6 Allen, 549.
[8] 18 Johns. 485.
[9] 15 Conn. 52.
[10] 132 Mass. 525.
[11] 114 Mass. 400.

(t.) *Plaintiff's Negligence no Bar to a Recovery.*

KELLY *v.* SOLARI.

IN THE EXCHEQUER, NOVEMBER 18, 1841.

[*Reported in* 9 *Meeson & Welsby*, 54.]

ASSUMPSIT for money paid, money had and received, and on an account stated. Plea, *non assumpsit*. At the trial before Lord ABINGER, C. B., at the London sittings after Trinity term, it appeared that this was an action brought by the plaintiff, as one of the directors of the Argus Life Assurance Company, to recover from the defendant, Madame Solari, the sum of 197*l.* 10*s.* alleged to have been paid to her by the company under a mistake of fact, under the following circumstances.

Mr. Angelo Solari, the late husband of the defendant, in the year 1836 effected a policy on his life with the Argus Assurance Company for £200. He died on the 18th of October, 1840, leaving the defendant his executrix, not having (by mistake) paid the quarterly premium on the policy, which became due on the 3d of September preceding. In November, the actuary of the office informed two of the directors, Mr. Bates and Mr. Clift, that the policy had lapsed by reason of the non-payment of the premium, and Mr. Clift thereupon wrote on the policy, in pencil, the word "lapsed." On the 6th of February, 1841, the defendant proved her husband's will; and on the 13th, applied at the Argus office for the payment of the sum of £1000, secured upon the policy in question and two others. Messrs. Bates and Clift, and a third director, accordingly drew a cheque for 987*l.* 10*s.*, which they handed to the defendant's agent, the discount being deducted in consideration of the payment being made three months earlier than by the rules of the office it was payable. Messrs. Bates and Clift stated in evidence, that they had, at the time of so paying the money, entirely forgotten that the policy in question had lapsed. Under these circumstances, the Lord CHIEF BARON expressed his opinion, that if the directors had had knowledge, or the means of knowledge, of the policy having lapsed, the plaintiff could not recover, and that their afterwards forgetting it would make no difference; and he accordingly directed a nonsuit, reserving leave to the plaintiff to move to enter a verdict for him for the amount claimed.

Thesiger, in the former part of this term, obtained a rule *nisi* accordingly, or for a new trial; against which,

Platt and *Butt* now showed cause.

Thesiger and *Whateley, contra.*

Lord ABINGER, C. B. I think the defendant ought to have had the opportunity of taking the opinion of the jury on the question whether in reality

the directors had a knowledge of the facts, and therefore that there should be a new trial, and not a verdict for the plaintiff; although I am now prepared to say that I laid down the rule too broadly at the trial, as to the effect of their having had means of knowledge. That is a very vague expression, and it is difficult to say with precision what it amounts to; for example, it may be that the party may have the means of knowledge on a particular subject, only by sending to and obtaining information from a correspondent abroad. In the case of Bilbie *v.* Lumley, the argument as to the party having means of knowledge was used by counsel, and adopted by some of the judges; but that was a peculiar case, and there can be no question that if the point had been left to the jury, they would have found that the plaintiff had actual knowledge. The safest rule however is, that if the party makes the payment with full knowledge of the facts, although under ignorance of the law, there being no fraud on the other side, he cannot recover it back again. There may also be cases in which, although he might by investigation learn the state of facts more accurately, he declines to do so, and chooses to pay the money notwithstanding; in that case there can be no doubt that he is equally bound. Then there is a third case, and the most difficult one, — where the party had once a full knowledge of the facts, but has since forgotten them. I certainly laid down the rule too widely to the jury, when I told them that if the directors once knew the facts they must be taken still to know them, and could not recover by saying that they had since forgotten them. I think the knowledge of the facts which disentitles the party from recovering, must mean a knowledge existing in the mind at the time of payment. I have little doubt in this case that the directors had forgotten the fact, otherwise I do not believe they would have brought the action; but as Mr. *Platt* certainly has a right to have that question submitted to the jury, there must be a new trial.

Parke, B. I entirely agree in the opinion just pronounced by my Lord Chief Baron, that there ought to be a new trial. I think that where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back, and it is against conscience to retain it; though a demand may be necessary in those cases in which the party receiving may have been ignorant of the mistake. The position that a person so paying is precluded from recovering by laches, in not availing himself of the means of knowledge in his power, seems, from the cases cited, to have been founded on the *dictum* of Mr. Justice Bayley, in the case of Milnes *v.* Duncan; and with all respect to that authority, I do not think it can be sustained in point of law. If, indeed, the money is intentionally paid, without reference to the truth or falsehood of the fact, the plaintiff meaning to waive all inquiry into it, and that the person receiving shall have the money at all events,

whether the fact be true or false, the latter is certainly entitled to retain it; but if it is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been, in omitting to use due diligence to inquire into the fact. In such a case the receiver was not entitled to it, nor intended to have it.

GURNEY, B., concurred.

ROLFE, B. I am of the same opinion. With respect to the argument, that money cannot be recovered back except where it is unconscientious to retain it, it seems to me, that wherever it is paid under a mistake of fact, and the party would not have paid it if the fact had been known to him, it cannot be otherwise than unconscientious to retain it. But I agree that Mr. *Platt* has a right to go to the jury again, upon two grounds: first, that the jury may possibly find that the directors had not in truth forgotten the fact; and secondly, they may also come to the conclusion, that they had determined that they would not expose the office to unpopularity, and would therefore pay the money at all events; in which case I quite agree that they could not recover it back.

Rule absolute for a new trial.

PRESIDENT, DIRECTORS AND COMPANY OF THE APPLETON BANK *v.* DAVID F. McGILVRAY AND OTHERS.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, OCTOBER TERM, 1855.

[*Reported in* 4 *Gray*, 518.]

ACTION OF CONTRACT to recover $370.42, received by the defendants to the plaintiffs' use.

At the trial before BIGELOW, J., the plaintiffs, to prove their case, called a witness, who testified that he had been an expressman between Boston and Lowell for eleven years, and that was his whole business; that sometime previous to April 7, 1854, he received for collection from the defendants, a partnership doing business in Boston, two notes of J. C. Hildreth & Co., a partnership doing business in Lowell, for $370.42 each, the one due on the 7th and the other on the 13th of April, and both payable to the defendants, and indorsed in blank by them; and was directed to collect them in the ordinary way, without any directions as to protesting them, and gave his receipt therefor; that it was sometimes his custom to collect notes by depositing them in a bank, and sometimes by calling on the parties personally, though he did not communicate to the defendants how he was going to collect their notes, and did not know that they knew he ever collected notes delivered him through the banks; that before the 7th of April

he deposited the notes with the plaintiffs, a bank in Lowell, for collection; that on the 8th of April he called on the plaintiffs, and asked if the note due the day before had been paid, and was informed by a clerk of the plaintiffs that it had been, and received the amount of it from the plaintiffs; that the plaintiffs received no compensation for collecting these notes, and he did not communicate to the plaintiffs, when he left the notes, to whom they belonged; that he took the money so paid, and the same day paid it to the defendants, but did not remember telling the defendants, when he paid them the money, that he collected it through the plaintiffs, or any bank; and the defendants paid him for his services.

The plaintiffs also proved that, by reason of the notes not having been placed on their regular file, they had not notified Hildreth & Co., the promisors, of the maturity of the first note, and their clerk was led into the mistake of supposing that it had been paid, when in fact it had not, and has never been paid to any one; that on the 10th of April, as soon as the mistake was discovered, the plaintiffs demanded payment of the promisors, who refused, and on the 11th of April these facts were communicated to the defendants, and the note tendered them, and the money they had received from the carrier demanded by the plaintiffs, and refused by them.

It was also proved that the promisors had not funds to pay the note when due on the 7th of April, and had determined not to pay it, and would not have paid it, if presented; that after the 7th they paid no business debts (this being one), and no change took place in their circumstances; but they continued in possession of a stock of dry goods until the 17th of April, when they were sued by the defendants on the note which fell due on the 13th of April, and an attachment of their stock made, which was afterwards dissolved by an assignment of their estate under the insolvent laws; and the second note was never paid, but was proved in insolvency against their estate.

Upon these facts, the defendants contended that there was no such privity or agency proved to have existed between the parties, as to enable the plaintiffs to maintain this action; and that, as the mistake arose from the negligence of the plaintiffs, they had no remedy against the defendants. A verdict was taken by consent for the plaintiffs, subject to the opinion of the full court.

D. S. Richardson and *W. A. Richardson* for the plaintiffs.

J. G. Abbott for the defendants.[1]

BIGELOW, J. This view of the legal relation of the parties is decisive of the remaining objection to the plaintiffs' right of recovery in this action. The money was clearly paid over to the defendants under a mistake of fact, and, upon familiar principles, an action can be maintained to recover it back. It is no answer to the plaintiffs' claim, that the mistake arose from the negligence of the plaintiffs. The ground on which the rule rests is, that money,

[1] A portion of the opinion relating to questions of agency has been omitted. — ED.

paid through misapprehension of facts, in equity and good conscience belongs to the party who paid it; and cannot be justly retained by the party receiving it, consistently with a true application of the real facts to the legal rights of the parties.[1] The cause of the mistake therefore is wholly immaterial. The money is none the less due to the plaintiffs, because their negligence caused the mistake under which the payment was made. The case would have been different, if it had appeared that the defendants had suffered any damage, or changed their situation as respects their debtor, by reason of the laches of the plaintiffs. But the facts show that their rights were wholly unaffected by the mistake under which the payment was made. Nothing occurred subsequently to the payment, which renders it unconscientious to recover the money back. It is therefore clear that the defendants have money belonging to the plaintiffs in their hands, to which they show no legal or equitable title. Kelly *v.* Solari;[2] Bell *v.* Gardiner;[3] 2 Smith's Lead. Cas. 243, 244.

Judgment on the verdict.[4]

THE STANLEY RULE AND LEVEL COMPANY *v.* LEONARD BAILEY.

In the Supreme Court of Errors of Connecticut, January Term, 1878.

[*Reported in* 45 *Connecticut Reports*, 464.]

Assumpsit, to recover back money claimed to have been paid under a mistake of facts; brought to the Court of Common Pleas of Hartford County. The facts were found by a committee, and on the facts the court (McManus, J.) rendered judgment for the plaintiffs. The defendant brought the record before this court by a motion in error. The case is sufficiently stated in the opinion.

G. G. Sill for the plaintiff in error.

C. E. Mitchell for the defendants in error.

Park, C. J. We think the finding of the court below, that the money sought to be recovered in this suit was paid by the plaintiffs to the defendant through misapprehension of the facts with regard to their obligation to pay it, is decisive of the case. It is conceded that the plaintiffs are entitled to recover a part of the amount, and we think it is equally clear they ought to recover the whole. That part of it which is in dispute was paid to the defendant as a royalty for the privilege of manufacturing and selling certain articles, under certain patents, of which the defendant previous to this time was the owner. The money was paid according to the terms of

[1] 2 Saund. Pl. & Ev. 2d Ed. 394. [2] 9 M. & W. 54. [3] 4 Man. & G. 11.

[4] Lawrence *v.* American National Bank, 54 N. Y. 432; Guild *v.* Baldridge, 2 Swan, 295, *accord.* — Ed.

a certain contract between the parties, wherein the defendant, for the consideration of a certain royalty to be paid on all the articles covered by the patents which should be manufactured and sold by the plaintiffs, granted them the privilege of manufacturing and selling them during the continuance of the patents and any extension of them. The plaintiffs manufactured and sold the articles, and paid the royalty according to the terms of the contract. In the mean time some of the defendant's patents expired and were not extended, but the plaintiffs being ignorant of the fact continued to pay the royalty as they had done before, and paid the sum which they now seek to recover on patents which had thus expired. The defendant knew that the patents had expired and had not been renewed at the time he received the money; but believing that he had the right to receive it under the contract, did not state the fact to the plaintiffs.

It further appears that the plaintiffs paid the money believing that the patents were in force, and that they would not have paid it had they known the facts. But it is said that they had the means of knowledge, and that this is equivalent to knowledge itself. There may be such full and complete means of knowledge as to be equivalent to knowledge itself, but we think this is not such a case. The defendant owned the patents. He was in the employ of the plaintiffs. The patents were on a large number of articles; and some of them were covered by two or more patents of different dates. The case was a complicated one, and required thorough examination to determine the exact fact. It would naturally be expected that the defendant would keep himself informed on the matter, and being in the employment of the plaintiffs would inform them when the patents expired. This would reasonably be expected by the plaintiffs where they had no reason to suspect dishonesty in the defendant; and we think they had a right to rely on what would ordinarily be expected under the circumstances.[1]

It is further claimed that, whatever might otherwise be the right of the plaintiffs to repayment, they have lost the right, inasmuch as they made a voluntary payment of the royalty on articles covered by the remaining patents, after they had become apprised of the fact that they had paid the royalty on patents which had expired. This claim is made upon the idea that the last payment made the first payment voluntary, although it was not so originally. But a payment is either voluntary or involuntary at the time it is made, and nothing can occur afterwards to alter its character in this respect. As well might it be claimed, if A. sues B. upon a note, and B. has a claim against A. for work done at his request, that unless B. sets off his claim against A.'s demand he thereby acknowledges that he has no claim, and cannot afterwards recover it. This claim is clearly without foundation.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

[1] A portion of the opinion relating to the construction of the contract has been omitted. — Ed.

DOUGALD McARTHUR *v.* THEODORE LUCE, *et al.*

IN THE SUPREME COURT OF MICHIGAN, APRIL 28, 1880.

[*Reported in* 43 *Michigan Reports*, 435.]

ERROR to Alpena. Submitted April 22. Decided April 28.

Assumpsit. Plaintiff brings error.

Kelley and *Clayberg* for plaintiff in error.

Turnbull and *McDonald* for defendant in error.

MARSTON, C. J. Luce & Co., in demanding that McArthur pay them for logs cut, as they supposed, upon their land, acted in entire good faith. They had a survey made, and according thereto the plaintiff had cut logs over the line. When the claim was made upon the plaintiff he employed a surveyor and they went upon the land, and plaintiff then became satisfied that he had cut and taken logs from off defendants' land, and authorized a settlement to be made, which was done. This was in 1871, and all parties rested in the belief that a correct settlement had been made until some time in 1875, when a new survey established the fact that no logs had been cut upon defendants' land, and this action was brought to recover back the moneys paid, upon the claim of having been paid under a mistake of fact.

Where a claim is thus made against another who, not relying upon the representations of the claimant, has the opportunity to and does investigate the facts, and thereupon becomes satisfied that the claim made is correct and adjusts and pays the same, I think such settlement and payment should be considered as final. If not, it is very difficult to say when such disputed questions could be considered as finally settled, or litigation ended. In the settlement of disputed questions where both parties have equal opportunity and facilities for ascertaining the facts, it becomes incumbent on each to then make his investigation, and not carelessly settle, trusting to future investigation to show a mistake of fact and enable him to recover back the amount paid. One course encourages carelessness and breeds litigation after witnesses have passed beyond the reach of the parties: the other encourages parties in ascertaining what the facts and circumstances actually are while the transaction is fresh in the minds of all, and a final and peaceful settlement thereof. Detroit Advertiser & Tribune Co. *v.* Detroit,[1] and County of Wayne *v.* Randall.[2]

The judgment must be affirmed with costs.

The other justices concurred.[3]

[1] 43 Mich. 116. [2] 43 Mich. 137.

[3] In Windbiel *v.* Carroll, 16 Hun, 101, it was held that one who pays a claim knowing that it has been paid before, but ignorant of the means of proving that fact, cannot recover the money so paid. *Conf.* Guild *v.* Baldridge, 2 Swan, 295. — ED.

(j.) Defence of Purchase for Value.

ATTORNEY-GENERAL *v.* PERRY.

IN THE EXCHEQUER, EASTER TERM, 1735.

[*Reported in Comyns*, 481.]

THIS was an information by the Attorney-General for 623*l.* 14*s.* 3*d.* halfpenny, due to his Majesty for so much money received by the defendant for his late Majesty's use, between April the 1st, 1725, and the 1st of September following.

The defendant pleads that he is not indebted for the said sum.

Upon a trial by a jury of Middlesex, they find specially to the effect following, viz.: That on the 24th of September, 1724, the defendant imported into the port of London 28,333 pounds weight of Virginia tobacco, and paid custom for the same, viz., 88*l.* 10*s.* 9*d.* halfpenny for the old subsidy, and gave security by bond to pay 535*l.* 3*s.* 6*d.* halfpenny for the additional duties due to his late Majesty on importation of the said tobacco. That in May, 1725, the defendant sold the said tobacco to Richard Corbet, for exportation to Cadiz in Spain, and shipped off the same in the port of London in the ship called the Francis and Mary, Isaac Cocart, master, for Cadiz. That on the 14th of July, 1725, Richard Corbet made oath before the proper officer, that he had the direction of the said voyage, and that all the said tobacco so shipped was exported really and truly for parts beyond the seas, on commission, and that none of the said tobacco had been since landed, or was intended to be relanded in Great Britain or Ireland.

That John Walkley, the defendant's servant, made the usual oath, that the duty of the said tobacco was paid or secured, and that the defendant had sold it for exportation. That on the 5th of June, 1725, a declaration of the contents of the loading of the said ship was made in these words: A content in the Francis and Mary, Isaac Cocart, for Cadiz, 40 ton, 5 men, 4 guns, 1, 38. Micha. Perry, etc. That on the same day Isaac Cocart made oath under the said content before the proper officer, that the said content contained a just and true account of all the goods, etc., on board his ship for the present voyage, and that he would take no more goods on board without first paying custom, and having a warrant from the King's officers; and that if he should take on board any certificate goods, or goods that received a drawback, bounty, or premium on exportation, that he would not reland them, or suffer them to be unshipped in order to be relanded, without the presence of the King's officers.

That the said tobacco being so put on board the ship, and certified by the proper officers of the customs, two debentures were made out; one for the drawback of 88*l.* 10*s.* 9*d.* halfpenny; the other for the drawback or discharge of the 535*l.* 3*s.* 6*d.* halfpenny, secured by the defendant, upon which the defendant, on the 13th of August, 1725, received back the 88*l.* 10*s.* 9*d.* halfpenny; and on the 17th of August, 1725, had his bond for the 535*l.* 3*s.* 6*d.* halfpenny delivered up to him.

That this tobacco after it was put on board was landed in Ireland on the 28th of July, 1725, but without the defendant's privity, nor had he the property in it from the time it was put on board, nor the direction of the voyage; but it was sold by the defendant for 1269*l.* 11*s.* 2*d.* for exportation to the said Richard Corbet; whereof 645*l.* 16*s.* 10*d.* halfpenny was paid in money, and the debentures were taken for the remainder of the price, and if by any accident the debentures became void, the said Richard Corbet was to answer the amount in money to the defendant.

That Richard Corbet hath been absent five years, but the King's officers had no notice of the tobacco being landed in Ireland till June, 1733. *Et si supra totam, etc.*

Attorney-General and *Solicitor-General*, for the Crown.

Mr. *Strange* and Mr. *Bootle*, for the defendant.

And on full consideration of the case, REYNOLDS, C. B., CARTER and FORTESCUE, BB., against THOMSON, B., were of opinion, first, That the debenture for the drawback given by Corbet to the defendant, by landing the tobacco in Ireland, became void; for no drawback ought to be made unless the goods be exported; the words of the statute 13 & 14 Car. 2. c. 11, are express, No allowance shall be made or demanded if the goods be re-landed, etc. And so by the statute 6 Geo. c. 21, if landed in Ireland the debenture for the drawback shall be void.

Second, that the payment of the money to the defendant by the King's officers upon this void debenture renders the defendant answerable to the King for the money by him received; for whoever receives the King's money, without warrant or lawful authority, is accountable to the King for it. This is expressly resolved by two Chief Justices and the Chief Baron, 11 Co. 90, the Earl of Devonshire's case, who was Master of the Ordnance, and by Privy Seal 2 Jac., reciting that munition utterly decayed and unserviceable had been claimed as fees and vails to the Master of the Ordnance by reason of his said office belonging; and giving him authority to dispose of such of them as were set down in a book, etc., he had disposed of several pieces of iron ordnance, shot, and munition in the said book set down; for those things being received and disposed by him by color of a Privy Seal, which was void, because founded on a false suggestion (for it suggests that these were fees or vails claimed as belonging to the said office, which must mean lawfully claimed and lawfully belonging, which was not true, for this was a

new office erected 35 H. 8.), the Earl was accountable for them as much as if he had taken them without any Privy Seal. So in Sir Walter Mildmay's case,[1] cited, 11 Co. 91, and reported Cro. Eliz. 545; Mo. 475, who being Chancellor of the Exchequer received 140*l.* a year for thirty years together, by warrant from the Lord Treasurer, as an augmentation of his fees, since the Court of Wards was annexed to the exchequer, whereby his labor was much increased; but because such warrant was void, it was resolved that he should answer for the monies which he had received.

And this is not from any peculiar prerogative the Crown hath above a subject, for the case would be the same with regard to a common person; whenever a man receives money belonging to another without any reason, authority, or consideration, an action lies against the receiver as for money received to the other's use; and this, as well where the money is received through mistake under color, and upon an apprehension, though a mistaken apprehension, of having a good authority to receive it, as where it is received by imposition, fraud, or deceit in the receiver (for there is always an imposition and deceit upon him that pays, where it is paid) by color of a void warrant or authority, although the receiver be innocent of it.

Cases might be cited to warrant every part of this rule; but as the defendant appears to be an innocent person, wholly ignorant of the fraud of Corbet in landing the tobacco in Ireland, and one who thought he had a good debenture, and was lawfully entitled to receive the drawback, it is necessary to instance only cases where the party receiving thought at the time of his receipt that he had a good authority to do so, but afterwards discovers that he had not; as where a man having a grant, an office, or conveyance of lands, and thinking himself well entitled receives the rents and profits, it is well known that if it afterwards appear that the grant or title is not good, the receiver is chargeable by the rightful officer or owner of the land for so much money received to his use. 2 Mod. 260, 263; 2 Jon. 127[2]; 2 Lev. 245; 3 Lev. 262.[3]

The cases cited by Mr. Attorney-General are strong to the same purpose. A man insuring a ship, on a rumor that the ship is lost, pays the insurance, and it afterwards appears that the ship is not lost, the insured shall pay back the money.[4] And Jacob and Allen.[5] By TREVOR, C. J., if an administrator authorizes A. to collect the debts and effects of his intestate, which he receives and pays over, and then a will is discovered, the rightful executor may bring assumpsit against A. for what he has received, as money received to his use. It was there insisted, that A. was only agent for the administrator, received the money for his use, and had paid it to him; yet held, that the administration being void, the administrator could give no authority, and consequently A. received without authority, and then noth-

[1] Godb. 292; 2 Roll. Abr. 161.
[2] 1 Freem. 478; s. c. 2 Show. 21.
[3] 3 Mod. 239; 1 Show. 35; Carth. 90; s. c. Comb. 151.
[4] 1 Salk. 22.
[5] 1 Salk. 27. 2 Ann.

ing hinders the raising an implied contract, and charging the defendant in an *indebitatus assumpsit.*

So in the case of Martin and Sitwell,[1] where Barkedale had made a policy of insurance for 5*l.* premium in the plaintiff's name, and paid the money to the defendant, and it afterwards appeared that the defendant had no goods on board, upon which Martin brought assumpsit for the 5*l.* premium, and it was insisted that this was money received from B. and to his use; but as Martin was trustee for B. the payment by B. must be taken as agent for him; whereby it is plain that there is no force in that objection, that the defendant acted as agent for Corbet, and received the drawback by his authority, and for his use.

But it is further objected, that Corbet being the person who committed the fraud, who was the exporter, and entitled to the drawback, the Crown ought to pursue their remedy against him, and not against the defendant, who was innocent, and took this money only in his own behalf, and for satisfaction of a debt owing to him from Corbet.

It is certain that for any penalty forfeited by the landing in Ireland, Corbet, and not the defendant, ought to be prosecuted; but when Corbet obtains a debenture, which he himself makes void and ineffectual, and delivers this debenture as payment for the tobacco he bought of the defendant, what need is there to resort farther than to him who had the money from the Crown? Hasser and Wallis.[2] A man marries a woman seised of lands, and takes the rents and profits, but afterwards it appears that he had a former wife then living; upon which she brings assumpsit against the husband for money received to her use; and though it was objected, that the payment to him, who had no authority to take the rents, was absolutely void, and that the tenants might be sued, for the money still lay in their hands, and they might sue Wallis; yet the court held that the action was maintainable against Wallis who received the rents, and that a recovery against him would be a discharge to the tenants.

As to the case of Tomkins and Barrett,[3] upon an usurious contract, the case appears to be good law; the same case is reported in Skin. p. 411. But there is a mistake in one of the reports, for Salkeld saith that it was in the Common Pleas, and came to trial before Chief Justice TREBY; Skinner, that it was in the King's Bench, and came to trial before Chief Justice HOLT; unless it can be supposed, that the same, which in both reports is said to be H. 5 W. & M., should after a nonsuit in one court be brought on to trial in the other court; for this is an exception to the general rule, that where a man receives money for an unlawful purpose, or upon an illegal contract, he who is party to the unlawful act shall not exempt himself, and defeat what himself hath done, by falling on his accomplice, who is not more criminal than himself; as in the case there put, if

[1] 1 Show. 156; s.c. Holt, 25.
[2] 1 Salk. 28.
[3] 1 Salk. 22.

a man gives money to A. to bribe the custom-house officers, who pays it accordingly, he shall not afterwards charge A. for this money as received to his use.

So if a man gives a bond upon an usurious contract, and pay part of the money, and afterwards an action is brought on the bond, to which the statute is pleaded, and the bond thereby avoided, he who paid part shall not maintain an action against the receiver, as for so much received to his use, for he was party to this usurious agreement; and though an act of Parliament makes the bond void, yet it is only to him who claims the benefit of the statute and pleads it; for if he plead *non est factum*, or *solvit ad diem*, the plaintiff will recover; if then he pay the money, he waives the advantage of the statute; and a party equally faulty, who pays his money pursuant to a faulty agreement, ought not to have it back again; so that the reasons given by TREBY, that the plaintiff in such case is *particeps criminis*, etc., *volenti non fit injuria*, seem not altogether so improper.

The objection made, that in this case no privity was between the King and the defendant, was likewise made in the Earl of Devonshire's case,[1] and in Sir Walter Mildmay's case there cited; but it was there answered, that in the case of the Crown the law will raise and create a privity so as to render him accountable who receives any of the King's money.

And in case the defendant be chargeable, the executors will be so likewise; they were resolved so to be in both these cases.

All the Barons agreed that the delivering up the bond could not be considered as money received to the King's use; and therefore it was adjudged by the court, that his Majesty do recover against the said Micajah Perry the sum of 88*l.* 10*s.* 9*d.* halfpenny, being so much by him unjustly received in money of the officers of the customs for the duty inwards, called the old subsidy; but as to the residue of the said 623*l.* 14*s.* 3*d.* halfpenny in the said information mentioned, that the said Micajah Perry do go without a day as to such residue, saving his Majesty's right, if he shall think fit hereafter to prosecute him for it.

WILLIAM YOUMANS, RESPONDENT, *v.* APOLLOS C. EDGERTON, APPELLANT.

IN THE SUPREME COURT OF NEW YORK, NOVEMBER TERM, 1878.

[*Reported in* 16 *Hun*, 28.]

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee.

The action was brought by the plaintiff as assignee of William T. Kilmer and John Hodge against defendant, to recover money paid on a contract for the purchase of land, made by Kilmer with one James R. Shaver.

[1] 11 Co. 90.

One Knapp was the original owner of lot number eleven, in regard to which this claim arises. In 1859 he entered into a written contract to sell this lot for $600 to Townsend Shaver, and to give him a warranty deed; the last instalment payable June 1, 1865. Townsend Shaver went into possession and remained in possession till he sold to James R. Shaver, but paid nothing. In 1864, Townsend Shaver made a written contract with James R. Shaver to sell him this lot for $1097.34, and to give him a warranty deed, the last instalment payable June 1, 1869. James R. Shaver went into possession and remained in possession till he sold to Kilmer. The referee finds that there is no evidence of payment on this contract. In February, 1867, James R. Shaver made a written contract with Kilmer to sell him this lot and lot ten for $1500, and to give a good and sufficient deed, the last instalment payable June 1, 1874. Kilmer soon after paid Shaver $200, and took possession. Afterwards, in April, 1867, James R. Shaver, for a good and valuable consideration, sold and delivered the last-mentioned Kilmer contract to the defendant, and assigned it to him by a written assignment thereon. The defendant took this assignment in good faith, and paid the full value thereof, and soon after gave Kilmer notice that he held the contract. James R. Shaver did not assign to the defendant the contract which he held of Townsend Shaver, unless such assignment is to be inferred from the assignment of the Kilmer contract. The defendant made no agreement with James R. Shaver to perform the Kilmer contract. Afterwards Kilmer gave the defendant a chattel mortgage, from which the defendant, about April, 1869, realized $200 as a part payment on the contract. Afterwards, and in April, 1869, Kilmer assigned, in writing, to one Hodge his contract with Shaver. Kilmer agreed to pay Hodge $200, and the amount that Hodge should pay, and Kilmer was to remain in possession. Kilmer did remain in possession till 1873, and then the premises were occupied by one Bryden, under Hodge, for about a year, and till the spring of 1874. On the 15th of April, 1874, Hodge entered into a written contract with one Keeler and one Wilson to sell them the lots ten and eleven for $1700. They took possession of the premises till the fall of 1874, when they agreed with Hodge to abandon, and did abandon the premises. At sundry times between April 20, 1869, and June 10, 1874, Hodge made payments to defendant on the Kilmer contract, and the last payment fully paid it up. In December, 1874, Hodge assigned the Kilmer contract to the plaintiff, and also all causes of action against Shaver and the defendant for breach of contract.

At the time that Hodge made the last payment to the defendant, he demanded a deed of the premises. On defendant's refusal, Hodge demanded back the moneys paid by him. The referee finds that all of the payments, except the last, were made and received in ignorance of the fact that Knapp had the title, and in the belief that James R. Shaver had a good title when he entered into the contract with Kilmer. It was claimed by the plaintiff

and denied by the defendant, that the defendant promised Hodge to give him a deed on the fulfilment of the contract. The referee, in his opinion, states that he makes no finding on that point. The referee held that the plaintiff was entitled to recover back of the moneys paid to the defendant, such proportion as the value of lot number eleven bore to the whole moneys, excepting such last payment, which was made with knowledge.

O. W. Smith for the appellant.

Youmans and *Niles* for the respondent.

LEARNED, P. J. The plaintiff claims to recover this money on two grounds. First. As money paid upon a consideration which has failed. Second. As money paid under mutual mistake of fact.

First. The question presented in the first ground is this: If A. contracts to sell land to B., and then for a valuable consideration assigns B.'s contract to C., and if B. pays C. the contract-price, and then A. refuses to convey, can B. recover from C. for breach of contract or failure of consideration? It seems to me that he cannot, unless C. has contracted with A. to fulfil the contract. Then, under the doctrine of Lawrence *v.* Fox,[1] B. might have the benefit of C.'s agreement with A. If, for instance, A. had not only assigned the contract, but had also conveyed the land to C., on consideration that C. would perform the contract, then probably B. would have an action on C.'s agreement. But in the absence of any such contract, and if C. had taken from A. only an assignment of B.'s contract, I cannot see that C. would be liable to B. Suppose that by the terms of the agreement B. was to give, and should give, his notes to A. as a consideration for the land. If A. transferred the notes to C., they would carry with them no obligation on C.'s part to perform the contract of sale.

So, in the present case, the plaintiff has taken Hodge's rights by assignment; Hodge took Kilmer's rights in the same way. The plaintiff then stands in Kilmer's place, and the only person with whom Kilmer had a contract was James R. Shaver. No one else has ever agreed to convey to Kilmer or to his assignees. The defendant paid Shaver in full, and only received a transfer of Shaver's right to collect the payments on the contract. He assumed no contract himself. And it should be observed that, strictly, this is not the case of a failure of consideration, but of breach of contract. The consideration for the payments made by Hodge was the contract on Shaver's part to convey. His contract was executory. On performance by Kilmer's assignee, the assignee had a right to demand a deed. If Shaver did not, or could not give a good and sufficient deed, then the action against him would be on the breach of contract, — on the breach of the written contract, — not on any implied liability for failure of consideration. Thus in Fletcher *v.* Button,[2] and in Lawrence *v.* Taylor,[3] both cited by the plaintiff, the action was in each case brought for the breach of the written obligation to convey the land.

[1] 20 N. Y. 268. [2] 4 N. Y. 396. [3] 5 Hill, 107.

The contract, then, was with Shaver, and there is no finding, and, so far as I can see, no evidence, that the plaintiff has ever demanded a deed from him. It is true, that the referee finds that the legal title was in Knapp up to the commencement of the action. But it does not follow conclusively from this fact, that James R. Shaver, if demand had been made of him, would not have obtained, through the Townsend Shaver contract, a good deed from the owner. At any rate his refusal should have been shown.

Second. The plaintiff claims to recover this money as paid under a mutual mistake of fact; and this is the view taken by the learned referee. It is very important to see exactly what the mutual mistake is on which the recovery is claimed. The money was paid severally by Kilmer and by Hodge to the defendant. The learned referee finds that when the payments (excepting the last) were made and received, Kilmer, Hodge and the defendant were in ignorance that Knapp had the title to the lot, and that they believed that at the time when James R. Shaver made his contract with Kilmer he had a good title.

Now, I have already pointed out that the defendant was a *bona fide* purchaser for full value from Shaver of the moneys to be received on the Kilmer contract. It will readily be seen, therefore, that the principle of recovering money paid under mutual mistake will not apply to him, unless it would apply to Shaver, if he had not assigned to the defendant. Suppose, then, for a moment, that Kilmer and Shaver had made this contract under the mutual mistake (so called) above stated, and that Kilmer had paid Shaver under like mistake, what would have been Kilmer's remedy? Not an action for money paid under mutual mistake, but, as already pointed out, an action for breach of contract upon the failure of Shaver to convey. The cases referred to by the learned referee are cases of an executed contract; where, for instance, a deed has been given and the consideration paid, but the grantor had no title. Now, in the present case, it was not important that Shaver had no title when he executed the contract, if, when it was paid up, he was able to give a good deed which should convey the title. If he was unable then to convey, he was liable on his contract. Money is not paid by mistake when it is paid on an executory contract, and the consideration for the payment is the agreement of the other party.

But further, an action to recover back money paid by mistake is a strictly equitable action, based on the idea that the defendant ought not to retain that for which he has given nothing. Now the defendant in this case has given the full value for the money he has received. He purchased from Shaver the claim against Kilmer. Shaver, now it is said, cannot perform his part of the contract with Kilmer. It is then Shaver who holds, in this view, money which he ought to refund; not the defendant. The defendant has only received back what he paid to Shaver. The plaintiff's assignor trusted, not to the defendant's promise, but to Shaver's. To illustrate,

suppose that Shaver had given Hodge a deed, and had taken Hodge's note or bond for the purchase-money, and had then, for value received, transferred the note or bond to the defendant, and Hodge had paid the same to the defendant. If subsequently it should have proved that Shaver had no title, and Hodge should have sought to recover back the money as paid under mistake, against whom would the action lie, if at all? Clearly against Shaver, who had profited by the transaction; not against the defendant, an innocent party, who had not profited by it. If the present recovery be sustained, then the defendant is left remediless; and Shaver, the party who is confessedly to blame, retains all the benefit of the contract. For the defendant would seem to have no remedy against Shaver, and Shaver has had full payment on the contract. It was proved on the trial that Shaver is insolvent. That fact accounts probably for the attempt to make the defendant liable. But, of course, Shaver's insolvency is no reason for the defendant's liability. The plaintiff urged, on the trial, that there was evidence that the defendant agreed with Hodge to give him a deed. An examination of the case on this point satisfies me that this was not proved. Some other questions are presented as to the allowance of interest before demand, and as to the effect of the plaintiff's possession, and of the assignment to him of the contract, and of the want of an actual surrender. But it is unnecessary to pass upon them.

The judgment should be reversed; a new trial granted; reference discharged; costs to abide the event.

Present — Learned, P. J., Boardman and Bockes, JJ.

Judgment reversed and new trial granted; reference discharged; costs to abide event.

MERCHANTS' INSURANCE COMPANY OF PROVIDENCE *v.* CHARLES W. ABBOTT and Others.

In the Supreme Judicial Court of Massachusetts, September 13, 1881.

[*Reported in* 131 *Massachusetts Reports*, 397.]

Gray, C. J. These actions are in the nature of assumpsit for money had and received, with special counts alleging that the plaintiffs were induced to pay the money by fraud and mistake. The five cases were tried together, but are not exactly alike.

In the first action, which is brought by the Merchants' Insurance Company of Providence, R. I., against Charles W. Abbott and the members of the firm of Denny, Rice & Co., the material facts are shown by the report of the presiding justice and the special findings of the jury to be as follows: —

On March 17, 1876, a woollen mill was destroyed by fire, upon the con-

tents of which Abbott held a policy of insurance from the plaintiffs in the sum of $2500, payable in sixty days after satisfactory proofs and adjustment of loss, and providing that any fraud or false swearing in the proofs of loss should avoid the policy. Soon after the fire, Abbott made and delivered to the plaintiffs proofs of loss, and they, after a reasonable investigation, which disclosed no grounds for a refusal to pay, and in ignorance of any fraud on Abbott's part, adjusted the amount of the loss in accordance with such proofs.

Denny, Rice & Co. offered evidence of the following facts: At the time of the fire Abbott was indebted to them in the sum of about $4000. In the latter part of April, 1876, Abbott paid them about $1500 in cash, and, as security for the payment of the rest of his debt, executed an instrument in writing under seal, by which, after reciting the issuing of the policy, and that a claim for loss had arisen under it, he assigned to them all his "claims upon said insurance company for loss under said policy," and authorized them to demand and sue for the same in his name, if necessary, and the proceeds to enjoy to their own use, and generally to do all and every act in and about the premises which he might do if this assignment had not been made.

In June, 1876, at the expiration of the sixty days allowed by the terms of the policy, the plaintiffs, in good faith, and not knowing of any fraud on Abbott's part, paid to Denny, Rice & Co. the amount of the loss as adjusted, and took a receipt signed by them in this form: "Boston, May 25, 1876. Received of the Merchants' Insurance Company of Providence $2478.80 in full satisfaction and discharge of all claim for loss and damage under this policy by fire March 17, 1876, and this policy is hereby cancelled and surrendered." The sum so paid exactly extinguished the debt of Abbott to Denny, Rice & Co., and they never paid any part of it to him.

The mill and its contents, as the jury found, were burned with the knowledge and at the instigation of Abbott, and his proofs of loss were false and fraudulent. The plaintiffs did not learn that they had been defrauded until May, 1877, and then at once placed the case in the hands of legal counsel for investigation, and for prosecution, if investigation should warrant it; and on January 16, 1878, brought this action. The other defendants had no knowledge of any fraud, nor was any demand for the money made upon them before this action was commenced.

On June 5, 1877, Abbott filed a petition in bankruptcy, and on October 3, 1877, obtained a certificate of discharge, and no dividend was paid out of his estate.

The justice presiding at the trial ruled that Abbott's certificate of discharge was no bar to this action; and, holding that the facts offered to be proved by the other defendants constituted no defence, directed a general verdict for the plaintiffs, and reported the case for such disposition and judgment as the full court should determine.

There can be no doubt of the liability of Abbott in this action. If the money had been paid by the plaintiffs to him, it could be recovered back as money paid under the influence of a mistake between them and him as to the existence of a state of facts that would entitle him to the money.[1] Kelly *v.* Solari;[2] Townsend *v.* Crowdy;[3] Pearson *v.* Lord;[4] Stuart *v.* Sears;[5] Welch *v.* Goodwin;[6] 2 Phil. Ins. §§ 1816, 1817. Although Abbott has not in fact received the money, the payment of the money by the plaintiffs at his request in discharge of his debt to the other defendants is equivalent to the receipt by Abbott of so much money, and is sufficient to enable the plaintiffs to maintain the action against him upon the special count, if not upon the general count for money had and received. Emerson *v.* Baylies;[7] Perry *v.* Swasey.[8] This liability of Abbott to the plaintiffs, being a debt created by his own fraud, is not barred by his certificate of discharge in bankruptcy. U. S. Rev. Sts. § 5117; Turner *v.* Atwood;[9] Mudge *v.* Wilmot.[10]

As to the other defendants a different question is presented. If, before receiving the money from the plaintiffs, they had known the true state of facts, and had participated in Abbott's fraud, they would have been liable to refund the money. Martin *v.* Morgan;[11] Mason *v.* Waite.[12] But the report states that there was no evidence offered, nor was it contended at the trial, that they had any knowledge of the fraudulent conduct of Abbott, but it was conceded that they were wholly innocent parties.

As to them, therefore, assuming the truth of the facts which they offered to prove, the case stands thus: They held a valid debt against Abbott. The assignment by Abbott to them was made in consideration of that debt, and to secure the payment thereof. The previous existence of the debt does not make the assignment the less a conveyance for value. Blanchard *v.* Stevens;[13] Culver *v.* Benedict;[14] Ives *v.* Farmers' Bank;[15] Railroad Co. *v.* National Bank.[16] There is no question of the validity or of the genuineness of the assignment. Having been made after the fire, and after the amount of the loss had been adjusted between the plaintiffs and Abbott, it was in legal effect an assignment of a claim of Abbott upon the plaintiffs for a certain sum of money. That claim, not being negotiable in form, could not have been sued by these defendants except in Abbott's name, and subject to any defences which these plaintiffs had against him. But the plaintiffs, at

[1] Accordingly, in two other actions, brought by the Manufacturers' Fire and Marine Insurance Co. and the American Insurance Co., respectively, against Abbott only, to recover back money paid to him by the plaintiffs under the same circumstances as between them, which were tried, argued and determined with the cases in the text.

The plaintiffs had judgment.

[2] 9 M. & W. 54. [3] 8 C. B. N. S. 477. [4] 6 Mass. 81. [5] 119 Mass. 143.
[6] 123 Mass. 71. [7] 19 Pick. 55. [8] 12 Cush. 36. [9] 124 Mass. 411.
[10] 124 Mass. 493, and 103 U. S. 217.
[11] 3 Moore, 635; S. C. 1 Brod. & B. 289; Gow, 123. [12] 17 Mass. 560.
[13] 3 Cush. 162. [14] 13 Gray, 7. [15] 2 Allen, 236. [16] 102 U. S. 14, 58, 59.

Abbott's request, and without any suit, paid the amount of the loss, as adjusted between themselves and Abbott, directly to these defendants, who were wholly ignorant and innocent of the fraud of Abbott.

The plaintiffs do not stand in the position of resisting a claim of Denny, Rice & Co. on an alleged promise of the plaintiffs, in which case Denny, Rice & Co. would have to prove a valid contract of the plaintiffs to pay to them or to Abbott, their assignor. But the plaintiffs are seeking to recover back from Denny, Rice & Co. a sum of money which the plaintiffs have voluntarily paid to them, and which the plaintiffs assert to be wrongfully withheld from them by these defendants, and which they are therefore bound to prove that, as between these parties, the plaintiffs have the better right to, and it is inequitable and unjust that these defendants should retain.

The only contract of the plaintiffs was with Abbott, and the only mistake was as between them and him. The money was voluntarily paid by the plaintiffs in discharge of Abbott's supposed claim upon them under their policy, and to these defendants as the persons designated by Abbott to receive it, and was in legal effect a payment by the plaintiffs to Abbott. These defendants received the money, not in satisfaction of any promise which the plaintiffs had made to them (for the plaintiffs had made no such promise), but under the agreement of Abbott with these defendants that they might receive it from the plaintiffs and apply it to the satisfaction of Abbott's debt to themselves. In other words, the money was paid by the plaintiffs to these defendants, not as a sum which the latter were entitled to recover from the plaintiffs, but as a sum which the plaintiffs admitted to be due to Abbott, under their own contract with him, and which at his request and in his behalf they paid to these defendants, who at the time of receiving it knew no facts tending to show that it had not in truth become due from the plaintiffs to Abbott. This payment by the plaintiffs to these defendants at Abbott's request was a satisfaction of Abbott's debt to these defendants, and might have been so pleaded by him if sued by them upon that debt. Tuckerman *v.* Sleeper.[1] As between the plaintiffs and these defendants, there was no fraud, concealment, or mistake. These defendants had the right to receive from Abbott the sum which was paid to them. The assignment which they presented to the plaintiffs was genuine, and was all that it purported to be. They hold the money honestly, for value, with the right to retain it as their own, under a title derived from Abbott, and independent of the fraud practised by him upon the plaintiffs.

The case stands just as if the money had been paid by the plaintiffs to Abbott, and by Abbott to these defendants, in which case there could be no doubt that, while the plaintiffs could recover back the amount from Abbott, neither Abbott nor the plaintiffs could recover the amount from these defendants. The fact that the money, instead of being paid by the

[1] 9 Cush. 177.

plaintiffs to Abbott, and by Abbott to these defendants, was paid directly by the plaintiffs to these defendants, does not make any difference in the rights of the parties. The two forms do not differ in substance. In either case, Abbott alone is liable to the plaintiffs, and these defendants hold no money which *ex æquo et bono* they are bound to return either to Abbott or to the plaintiffs.

The case does not differ in principle from one in which B., having made a contract for the sale of goods in his possession to A., afterwards, by A.'s direction, actually delivers them to C., who has purchased them from A. in good faith for a valuable consideration as between A. and C., the nature of which is known to B., and B., upon subsequently discovering that the sale from himself to A. was procured by A.'s fraud, undertakes to recover the goods or their value from C.; or from a case in which a bank, having at the request of a debtor paid money to his creditor upon a bond or a check, under the mistaken supposition that the bond is secured by mortgage of property of the bank, or that the bank has funds of the debtor sufficient to meet the check, seeks to recover back the money so paid.

In Aiken *v.* Short,[1] the action was brought by the public officer of a bank against an executrix to recover back money paid to her under the following circumstances: George Carter had made to the defendant's testator a bond secured by equitable mortgage on property devised to him by Edwin Carter; and had afterwards conveyed the same property to the bank, the latter agreeing to pay the bond. The defendant applied to George Carter to pay the bond, and was referred by him to the bank, which, conceiving that the defendant had a good equitable charge, paid the debt to get rid of the charge affecting its own interest. By the discovery of a later will of Edwin Carter, it turned out that George Carter had no title to the property, and consequently that the defendant had no title, and the bank had none. It was held that the bank could not recover back the money which it had paid to the defendant.

Chief Baron Pollock, according to Hurlstone and Norman's report, after stating the facts of the case, said: "The bank had paid the money, in one sense, without any consideration, but the defendant had a perfect right to receive the money from Carter, and the bankers paid for him. They should have taken care not to have paid over the money to get a valueless security; but the defendant has nothing to do with their mistake. Suppose it was announced that there was to be a dividend on the estate of a trader, and persons to whom he was indebted went to an office and received instalments of the debts due to them, could the party paying recover back the money if it turned out that he was wrong in supposing that he had funds in hand? The money was in fact paid by the bank as the agents of Carter."[2] By the similar but fuller report in the Law Journal, it appears that the Chief Baron, after observing that the bankers "had paid the money, no doubt, in one

[1] 1 H. & N. 210; s. c. 25 L. J. (N.S.) Ex. 321. [2] 1 H. & N. 214.

sense, without any consideration," added, "What is that to the defendant, who received it, having a perfect right to receive his [her] money from somebody, that is, from George Carter? And I think the bankers must be considered rather as paying it for George Carter, and they ought to have taken care that they did not pay in their own wrong when they paid it. It appears to me that this does not at all fall within any case whatever deciding that money may be recovered back because it has been paid under a mistake." [1]

Barons PLATT, MARTIN and BRAMWELL were of the same opinion. Baron PLATT said, "The action for money had and received lies only for money which the defendant ought to refund *ex æquo et bono;*" and, after stating the other facts, said, "Carter referred her to the bank, who paid the debt, and the bond was satisfied. The money which the defendant got from her debtor was actually due to her, and there can be no obligation to refund it:" [2] or, according to the fuller report, "He refers her to the bank. They, acting as his agents, upon being referred to, pay his debt. How can that be properly recoverable? Surely the debt is satisfied. The debt was due. It is not as though there were no debt due, and there was a mistake of fact; but here the debt was actually due, and the money was paid to satisfy that debt. It appears to me clear, beyond all question, that this money cannot be recovered back." [3] Baron MARTIN said, "The case comes to this: If I apply to a man for payment of a debt, and some third person pays me, can he recover back the money because he has paid it under some misapprehension?" [4]

In Chambers *v.* Miller,[5] the plaintiff presented at the defendants' bank a check drawn on them by a customer, and received the money; and after he had counted it over once, and while he was recounting it, the defendants, having meanwhile discovered that the customer's account was overdrawn, forcibly detained the plaintiff, compelled him to give up the money, and returned the check to him; and he brought an action against them for assault and battery. Chief Justice ERLE at the trial ruled that the property in the money had passed to the plaintiff, and consequently that the defendants' justification failed; and his ruling was confirmed by the court in banc. The question whether the defendants had a right to take back the money by force, though mentioned by some of the judges, was not reserved or decided. See especially 32 L. J. (N. S.) C. P. 31, note.

The ground assigned for the decision by Chief Justice ERLE and Mr. Justice WILLIAMS was, that the money, having been once paid by the bankers to the payee of the check, became irrevocably his, and they could not have recovered it back from him in an action for money had and received, because as between them and him there was no manner of mistake, for the check

[1] 25 L. J. (N. S.) Ex. 323.
[2] 1 H. & N. 214, 215.
[3] 25 L. J. (N. S.) Ex. 324.
[4] 1 H. & N. 213, 214.
[5] 13 C. B. (N. S.) 125; S. C. 32 L. J. (N. S.) C. P. 30.

was genuine, and the money was due from the drawer to the payee, and the mistake as to the amount of the drawer's funds in the hands of the bankers was a mistake between him and them only, with which the payee had nothing to do. The CHIEF JUSTICE distinguished the case from that of Kelly *v.* Solari, above cited, in that "there the money was paid to a party who had no right to it whatever, and the mistake was between the parties themselves as to the money being due."[1] The like distinction was taken in Hull *v.* South Carolina Bank,[2] and in Guild *v.* Baldridge.[3]

So in Pollard *v.* Bank of England,[4] Lambton & Co., bankers, under the mistaken belief that they held funds of the acceptor of a bill of exchange, paid the amount of the bill to the Bank of England, which had discounted the bill for the drawer; and it was held, in a considered judgment delivered by Mr. Justice BLACKBURN, in behalf of himself and Chief Justice COCKBURN and Justices MELLOR and LUSH, that Lambton & Co. could not recover back from the Bank of England the amount so paid, and that the Bank of England therefore held the amount on the drawer's account.

For these reasons, the court is of opinion that, assuming the truth of the facts of which evidence was introduced by the defendants, the plaintiffs may maintain the action against Abbott, and not against Denny, Rice & Co.

In any view of the case, Denny, Rice & Co. and Abbott cannot be jointly charged in this action. They have made no joint contract with the plaintiffs, nor have they jointly received money from the plaintiffs. The grounds of liability of the two are distinct. The liability of Abbott to the plaintiffs rests upon the ground that, by reason of his fraud and their mistake, they have at his request paid money to the other defendants for his benefit; and it is independent of the question of the amount of his debt to the other defendants. The liability of Denny, Rice & Co., who were not parties to any fraud or mistake, can rest upon no other ground than their receipt and retention of money to which they have no right, and which, as between them and the plaintiffs, justly belongs to the latter; and this liability cannot exist unless the amount of the debt due from Abbott to them is less than the sum of money which they have received from the plaintiffs. The allegation in the amended declaration, that the money was paid by the plaintiffs for the joint use and benefit of both defendants, is therefore unsupported by the evidence, and the objection on the ground of this variance might be taken by the defendants at the trial. Manahan *v.* Gibbons.[5]

The other four actions are brought against Abbott and the members of the firm of Browne, Steese & Clarke. The only particulars appearing by the report, in which these cases differ from the first, are that the evidence introduced by the other defendants tended to show that Abbott's debt to them was in part for money advanced by them to him after the fire; that each of the assignments executed by him to them was in form a simple

[1] 32 L. J. (N. S.) C. P. 33. [2] Dudley, 259, 262. [3] 2 Swan, 295, 303.
[4] L. R. 6 Q. B. 623. [5] 19 Johns. 109.

assignment of all his "right, title, and interest in this policy, and all benefit and advantage to be derived therefrom;" and that in the fifth case Abbott signed a separate receipt similar to that signed by them, and the check given by the plaintiffs was payable to the order of Abbott and the other defendants.

But as the evidence introduced, as stated in the report, showed that in all these four cases "the amounts due on the policies as adjusted, assigned to them as aforesaid, were paid to Browne, Steese & Clarke by the insurance companies at the expiration of the sixty days allowed by the terms of the policies, and the money kept by them, and no part of it paid to Abbott," a majority of the court is of opinion that neither the difference in the form of the assignments in the four cases, nor that in the form of the receipts and of the check in one of them, can affect the result; but that the assignment in each case, having been made after the fire, and after the adjustment of the loss as between the company and Abbott, was in legal effect not an assignment of the policy as an existing contract of indemnity against future contingencies, but only an assignment of a claim upon the company for an ascertained sum of money; and that assuming the truth of the facts offered to be proved by the defendants, this sum, having been paid by the company to Browne, Steese & Clarke, without any fraud or mistake as between them, and not exceeding the amount of the demands of Browne, Steese & Clarke against Abbott, cannot be recovered back from them, but from him only.

The report provides that, if the court should be of opinion that the plaintiffs have no joint cause of action against the defendants, they may elect which of the defendants they will discontinue against, and such further proceedings shall thereupon be had as law and justice may require. The other defendants, in each case, contend that, as Abbott is the only party whose residence or place of business is in the county of Middlesex, the other defendants residing and doing business in Suffolk and the plaintiffs being a foreign corporation, therefore, if the plaintiffs elect to discontinue against Abbott, the defendants should be entitled to the same right to move to dismiss, or plead in abatement, that they would have had if the action had originally been brought against them alone, and they propose to plead in abatement that, as between them and the plaintiffs, the action is brought in the wrong county. Gen. Sts. c. 123, § 1. But the action was rightly brought in the county in which one of the defendants resided, and the case has been fully tried on the merits, without objection being taken to the venue by motion to dismiss or answer in abatement. The statutes provide that amendments discontinuing as to any joint plaintiff or defendant may be allowed at any time before final judgment, that judgment shall not be arrested in any civil action by reason of a mistake of venue; and that judgment may be entered against such defendants as are found on the trial to be liable on the contract declared on, notwithstanding it is found that all the defendants are not jointly liable thereon. Gen. Sts. c. 129, §§ 41,

79; c. 146, § 4; c. 133, §§ 5, 6. And the court is not ousted of its jurisdiction of a transitory action, once acquired by service upon a defendant residing in the county, by a failure to recover against him at the trial. Lucas *v.* Nichols.[1] The plaintiffs are therefore entitled, pursuant to the leave reserved in the report, to elect to prosecute their action against either defendant.

Under the rulings at the trial, the facts which the evidence introduced by the other defendants tended to show, as to the validity and amount of Abbott's debts to them, became immaterial, and were not passed upon by the jury, and the plaintiffs are entitled, if they so elect, to a new trial for the purpose of determining these facts. If, for this purpose, they elect further to prosecute either action against the other defendants, they must discontinue against Abbott; and neither the question of Abbott's fraud, which has been fully tried and settled by the verdict, nor the question of the other defendants' innocence of that fraud, which was conceded at the former trial, is to be open upon the new trial. Winn *v.* Columbian Ins. Co.;[2] Robbins *v.* Townsend;[3] Bardwell *v.* Conway Ins. Co.[4] If, on the other hand, the plaintiffs elect to discontinue against the other defendants, judgment must be entered for the latter, and

Judgment for the plaintiffs against Abbott alone.

The cases were argued in February, 1879, by *H. W. Suter* (*F. Dabney* with him), for Denny, Rice & Co., by *C. R. Train* and *E. W. Hutchins*, for Browne, Steese & Clarke, and by *J. P. Treadwell*, for the plaintiffs; and were reargued in March, 1881, by *F. Dabney* (*H. W. Suter* with him), for Denny, Rice & Co., by *A. S. Wheeler* and *E. W. Hutchins*, for Browne, Steese & Clarke, and by *W. G. Russell* and *J. P. Treadwell*, for the plaintiffs.

(*k.*) *Effect of Defendant's Change of Position.*

STANDISH *v.* ROSS.

In the Exchequer, February 15, 1849.

[*Reported in* 3 *Exchequer Reports*, 527.]

Debt for money had and received. Plea, never indebted.

At the trial, before Rolfe, B., at the Liverpool Spring Assizes, 1848, it appeared that the action was brought by the plaintiff, who was sheriff of Lancashire in 1846, to recover money paid to the defendant under the following circumstances: — The defendant having recovered judgment

[1] 5 Gray, 309. [2] 12 Pick. 279. [3] 20 Pick. 345. [4] 118 Mass. 465.

against one Hignett, in the afternoon of Saturday, the 25th April, 1846, placed in the sheriff's hands a writ of *fieri facias*, with a request to execute it on that day at the warehouse of Hignett at Manchester. The officer on going there found the warehouse closed, as was the custom in Manchester on a Saturday afternoon, and the writ remained unexecuted until the 11th May, when the officer entered and seized by the defendant's order. On the same day the sheriff assigned the goods seized to the defendant by bill of sale, which stated the consideration to be the sum of 256*l.*, paid by the defendant to the sheriff. A return of *fieri feci* was then made. Prior to the entry and seizure, the defendant's attorney had notice of an act of bankruptcy committed by Hignett before the 25th April; upon which a *fiat* issued on the 28th August, and assignees were appointed. The assignees brought trover against the sheriff for the goods seized, when he paid their value, and brought the present action to recover back the money so paid. It was submitted, on behalf of the defendant, that the action was not maintainable; and the learned judge, being of that opinion, nonsuited the plaintiff, reserving leave for him to move to enter a verdict.

A rule *nisi* having been obtained accordingly,

Atherton and *Unthank* showed cause.

Martin and *J. Addison*, in support of the rule.

The judgment of the court was now delivered by

Parke, B. This case was argued before the Lord Chief Baron and my Brothers Rolfe and Alderson, on showing cause against the rule to enter the verdict for the plaintiff. The action was brought by the plaintiff, who was sheriff of Lancashire in 1846, against the defendant for money had and received: the plea was the general issue. The defendant was a judgment creditor after verdict of one Hignett, a trader, and issued a *fieri facias* against his effects, which was put into the sheriff's hands on the 25th of April, 1846. The sheriff did not immediately levy, but waited until the 11th May, when he entered and seized by the defendant's order. Prior to the entry and seizure, on that day, the defendant's attorney had notice of an act of bankruptcy which had been committed by Hignett before the writ was put into the plaintiff's hands on the 25th; and a *fiat* was duly issued against Hignett in the month of August following, under which assignees were chosen at a meeting which was then held. Long prior to this the plaintiff had sold and delivered to the defendant the goods for 256*l.* by a bill of sale expressing that the defendant had paid that sum. The plaintiff then returned to the *fieri facias* "*fieri feci.*" The assignees, after their appointment, sued the plaintiff in an action of trover for the goods which were seized on the 11th May, and he was obliged to pay them 332*l.* The plaintiff brought the action afterwards to recover from the defendant 256*l.*, for which he had sold the goods to the defendant. My Brother Rolfe, having directed a nonsuit, reserved liberty to move to enter the verdict for that sum.

The case was fully argued before us, and we have not been without doubt on the question submitted to us; but, after full consideration, we think the rule must be made absolute.

Several objections were taken to the plaintiff's right to recover. One was, that no money was paid by the sheriff, the plaintiff, to the defendant. But although no money in fact passed, the bill of sale in the form in which it was drawn shows, as between the plaintiff and the defendant, that they were in the same situation as if the plaintiff had sold to the defendant and received the money; and the other evidence in the case also showed that it was treated as paid over to the defendant. Another objection was, that the money, when paid, was not the sheriff's money; but if it was not, the plaintiff was still entitled to recover back that money, which had been paid to the defendant under ignorance of matter of fact, as soon as he had been compelled to pay for the goods seized, to the real owner.

Again, it was objected, that the sheriff was estopped by the return of *fieri feci*. The case of Brydges *v.* Walford decided, that, as between the same parties, it was no absolute estoppel in another action; and though the return says that the goods were then the goods of the debtor, that did not estop the sheriff from saying that the then title of the debtor was defeated by matter subsequent. Such evidence does not in truth contradict the return.

It was then urged (and this objection was one which seemed at first to have the most weight in it), that the plaintiff had no right to recover back the money, as he could not put the defendant *in statu quo;* for, in the first place, if the sheriff had been guilty of neglect in not executing the process on the 25th of April, before the plaintiff in the suit had notice, the plaintiff would have had his remedy for that neglect, and that remedy was suspended by the sheriff's return of *fieri feci;* and in the second place, the plaintiff was prevented by the same return from having a *ca. sa.*, by which he might have taken the body of the bankrupt in execution. We think these circumstances make no difference in the case. When money is sought to be recovered, on the ground that the consideration stipulated by the contract has failed, it is a defence that the plaintiff has had the consideration in part, and that the parties could not be replaced *in statu quo*. That is the case of Hunt *v.* Silk.[1] But in this case the plaintiff's claim does not rest on the ground that the money has been so paid; it is for money paid, not merely by mistake, but in necessary invincible ignorance of matter of fact. The plaintiff, before the *fiat* issued, was bound to pay the proceeds of the execution to the execution plaintiff; he could not possibly know whether a *fiat*, which would defeat the title of the execution defendant to the goods, would issue or not. When the *fiat* issued, the title of the assignees related back, and made the sheriff a wrong-doer by relation, and he was then compellable to make good the loss of the goods to their true owner; and then

[1] 5 East, 449.

he contends, that he is justly entitled to recover back the price of them, which he has paid to the execution plaintiff. This he certainly is, as was said by the judges in Brydges *v.* Walford, and by Lord Ellenborough in Wilson *v.* Milner, unless it be an answer that the plaintiff cannot be put in the same situation. Does, then, this circumstance make a difference? It is to be borne in mind that the suspension of neither remedy was caused by any neglect or misconduct of the sheriff, as he was compellable to execute the writ when it was executed, and to make the return which was made. The remedy itself, by action against the sheriff for not executing the writ, remains; it is in respect of the delay of the remedy only that the defendant could not be put *in statu quo*. We think these circumstances form no impediment to the right to recover, if money were paid over under an ordinary mistake of fact; it could not be any bar to the recovery of it, that the defendant had applied the money in the mean time to some purchase which he otherwise would not have made, and so could not be placed *in statu quo*.

Rule absolute.

POOLEY *v.* BROWN.

In the Common Pleas, January 15, 1862.

[*Reported in* 11 *Common Bench Reports, New Series*, 566.]

This was an action for money had and received, etc. Plea, never indebted.

The cause was tried before Erle, C. J., at the sittings in London, after last Trinity term. The facts which appeared in evidence were as follows: In April, 1860, one Lindo brought to the plaintiff eight several bills of exchange, amounting together to the sum of 358*l.*, which purported to be drawn by one Meyer at Brussels upon and accepted by Messrs. Gilmore & Co. in London, and to be indorsed by Meyer in Brussels, and asked him to discount them for the defendant, but without recourse to him. The plaintiff consented to do so, and accordingly gave the defendant a check for 322*l.* 19*s.* 4*d.* The bills had affixed on them adhesive stamps pursuant to the 17 & 18 Vict. c. 83, s. 3, but it did not at the time occur to either of the parties to cancel the stamps, as required by s. 5.

It turned out that the name of Meyer as the drawer and indorser of these bills was forged. Gilmore & Co., the acceptors, having subsequently become bankrupt, the plaintiff, in April, 1861, sought to prove for the amount of the bills against their estate; when it was discovered that the stamps had not been cancelled, and the proof was rejected. The plaintiff then demanded back the sum which he had paid the defendant for the bills, as upon a failure of consideration.

On the part of the defendant, it was objected, that, by reason of the non-compliance with the statute, to which he was himself a party, it was not competent to the plaintiff to use the bills as evidence; that the plaintiff, by reason of his own laches, whereby he had materially altered the position of the defendant, had disabled himself from recovering back the money; and that, as there was no mistake of fact, the money was not recoverable back.

A verdict was taken for the plaintiff for 322*l.* 19*s.* 4*d.*, leave being reserved to the defendant to enter a nonsuit, if the court should be of opinion, that the plaintiff was not entitled to maintain the action.

C. Wood, in Michaelmas term last, accordingly obtained a rule *nisi* to enter a nonsuit, on the grounds, — "first, that the bills were inadmissible in evidence; secondly, that the plaintiff was a party to the violation of the statute, and caused his own loss; thirdly, delay in applying to the defendant for payment; fourthly, that, if any mistake, it was one of law, and not of fact."

J. Brown, with whom was *Hawkins*, Q. C., on a former day in this term showed cause.

Manisty, Q. C., and *Wood*, in support of the rule.

Erle, C. J. This was a rule to enter a verdict for the defendant. The facts were, that the plaintiff, in April, 1860, bought of the defendant for 323*l.* certain foreign bills of exchange purporting to be drawn by Meyer, in Brussels, on Gilmore & Co., of London: the defendant omitted to cancel the adhesive stamp, according to the 17 and 18 Vict. c. 83, s. 5, when he delivered them to the plaintiff (the cancellation having escaped the attention of each party at the time of the sale). Gilmore & Co. before the maturity of the bills became bankrupt. In April, 1861, they proposed a dividend; and these bills were tendered for proof, but rejected because the stamp was not cancelled. Then the plaintiff demanded, and brought this action for, the sum which he had paid to the defendant for the bills, on the ground that the consideration had wholly failed, — citing Young *v.* Cole,[1] where the purchaser of Guatemala bonds was held entitled to rescind the purchase and recover back the price, because they were not stamped with a Guatemala stamp, and Gurney *v.* Womersley,[2] where the plaintiff rescinded the contract and recovered the purchase-money paid for some bills which purported to be accepted by one Van Notten, but which (as to that name) were forgeries.

In answer to this claim of the plaintiff, the defendant has relied on two grounds, — first, that the consideration for which the plaintiff paid his money has not failed; on the contrary, the specific things which were the subject of the contract of sale were delivered and received, viz., the bills drawn by Meyer & Co., of Brussels, on Gilmore & Co. of London. At the time of the contract, they had all the qualities of the things which the

[1] 3 N. C. 724; 4 Scott, 489.

[2] 4 Ellis & B. 133.

defendant intended to sell and the plaintiff to buy. The defect arose in the process of delivery.

When foreign bills sold are delivered, the Stamp Act, 17 & 18 Vict. c. 83, commands the seller to cancel the adhesive stamp before he delivers, and the buyer to see that this has been done before he receives them. Each party in this case omitted to perform the duty so commanded: and the statute has declared the consequences which are to follow from this inattention, viz., the seller is to forfeit 50*l.* to the Queen, and the buyer is to lose the capacity of making the bills available for any purpose. Although the cancelling is required from the seller, the seeing that it has been done before he receives it is required from the buyer. Each of the actors has his duty enforced by the above-mentioned consequences from neglect; and the defendant contended upon the argument before us that there was nothing in the statute which laid the whole of the loss on the seller.

If this ground failed, then the second ground on which the defendant relied was, the time that had elapsed before the plaintiff claimed to rescind the contract and to recover back the purchase-money, and the change in the circumstances of the parties during that time. The plaintiff had kept the bills for a year; the defect was always apparent if he had known the law; and his ignorance of the law would be no excuse for his omitting to make his claim. During that time the acceptors had become bankrupt, and the drawer had not been made to pay; and the situation of the defendant may have been materially altered for the worse by the delay; while the plaintiff, by rescinding the contract, would gain so much more than he would have got with a valid transfer, as the price he paid exceeds the dividend he would receive under the bankruptcy. If any action lay, it would be more reasonable to sue in such case for the true loss rather than for the original price as money had and received.

Under these circumstances, we are all of opinion that the plaintiff had no right to rescind the contract of sale, and that the defendant is entitled to succeed on the second ground above mentioned.

My Brother KEATING and myself are also of opinion that the defendant is entitled to succeed on the first ground as above stated; but from this opinion my Brother WILLIAMS dissents.

WILLIAMS, J. I agree with my Lord and my Brother KEATING that this rule ought to be made absolute, but on the second ground only.

If the plaintiff had, within a reasonable time after he had received the bills from the defendant, and without any delay prejudicial to the latter, required him to take and return the purchase-money, on the ground that he had omitted to cancel the stamps, I think the plaintiff might have maintained this action, because I think there was an implied understanding when the bills were sold they were to be not merely foreign bills of exchange, but negotiable and available bills, as both parties believed

they were, and they have turned out not to be such bills, by reason of the defendant's neglecting to cancel the stamps before he parted with the bills, as required by the statute. I think, therefore, the plaintiff would have had a right to recover back the purchase-money, either by reason of the consideration having totally failed, or by reason of his having paid it in mistake of facts, as put by Lord CAMPBELL in Gompertz *v.* Bartlett.[1] I am strengthened in this view of the case by considering, that, if the vendee of a bill sold and delivered under such circumstances could be compelled to keep it, the bill must by the terms of the statute be wholly unavailable in his hands; whereas, if he be allowed to return it to the vendor, the latter may at all events sue the acceptor on it. Some doubt, perhaps, may exist whether he could, by transferring it subsequently to another vendee, or another holder for value, render it available in the hands of the latter, because the statute says that no person who shall take such a bill from another shall be allowed to make it available, unless at the time he takes it it shall bear a stamp cancelled in the manner directed, i. e. (as it might, perhaps, be contended), cancelled by the first holder before he has delivered the bill out of his hands to any one. But I can find nothing in the Act which would prevent the vendor, though he may have transferred the bill, in violation of the statute, without cancelling the stamp, from afterwards suing the acceptor on it, if the bill gets back to his (the vendor's) hands.

It was argued on behalf of the defendants, that it is unjust to allow the plaintiff to recover back the whole price of the bills, because he will thereby be put into a better plight than if the defendant had complied with the statute; in which case the defendant would only have been able to obtain a dividend under the acceptor's bankruptcy. But the answer to this argument is, I think, that, in truth, the defendant is merely remitted to the condition of being the holder of the bills of which, by reason of his own neglect to cancel the stamps, he has in the result never legally ceased to be holder. And no injustice is done to him thereby, if he is so remitted without any injurious delay.

In the present case, however, I agree with the rest of the court, in thinking that the action is not maintainable, because the vendee of the bills neglected for an unreasonable time to return them to the vendor, and must, under the circumstances, have thereby prejudiced the vendor as to his position in respect both of the drawer and the acceptors of the bills.

WILLES, J. Not having heard the whole of the argument, I take no part in the judgment in this case.

Rule absolute.

[1] 2 Ellis & B. 849.

NEWALL and Another *v.* TOMLINSON and Another.

In the Common Pleas, April 17, 1871.

[*Reported in Law Reports, 6 Common Pleas,* 405.]

Action for money had and received, money paid, interest, and money found due upon accounts stated. Plea, never indebted.

The particulars of demand were as follows: —

1870, Dec. 14. To amount of overcharge paid by the plaintiffs to the defendants, being an over-payment on invoice for 289 bales of cotton ex *Glen Cora,* dated April 22d, 1870, viz.: —

Error in weight of 74 bales of cotton, said to weigh 37,485 lbs. net, @ 11½*d.*, per lb.	£1796	3	1				
Discount	26	18	10	£1764	4	0	
whereas it ought to have been 26,685 lbs. 11½*d.* per lb.	1278	9	8				
Discount	19	0	8				
				1259	9	0	
				509	15	0	
Interest to 15th of December				15	17	2	
				£525	12	2	

The plaintiffs seek to recover the sum of 525*l.* 12*s.* 2*d.* as the difference due to them on the above account, and the like amount on accounts stated.

The plaintiffs also claim interest on 509*l.* 15*s.* (part of the said sum of 525*l.* 12*s.* 2*d.*) from the 15th day of December, 1870, till payment or judgment.

The cause was tried before Willes, J., at the last assizes at Liverpool. The facts were as follows: The plaintiffs and the defendants were respectively cotton-brokers in Liverpool. In April, 1870, the plaintiffs bought of the defendants 74 bales of cotton ex *Glen Cora,* each acting for principals whose names were not disclosed, and, according to the usage of the cotton-market, each treating the others as principals in the transaction. Weight-lists of the cotton were in the ordinary course delivered to each party from the warehouse-keeper at Albert Dock; but a clerk of the defendants made a mistake of 100 cwt. in adding up the figures, and the consequence was that when the plaintiffs paid for the cotton they paid the defendants too much by 509*l.* 15*s.* The mistake was not discovered until the 14th of December, when the plaintiffs demanded back that sum. The invoice for the cotton (which was delivered on the 22d of April) was headed as follows: — "Messrs. Newall & Clayton, bought from W. D. Tomlinson & Co." etc.; and it was not until after the discovery of the mistake that the plaintiffs were informed (as the fact was) that Messrs. Dixon & Co. were the defendants' principals.

In the mean time the defendants, who had previously to the arrival of the cotton advanced very considerable sums to the shippers, Messrs. Dixon & Co., had allowed the sum in question in their account with them, and had subsequently gone on making further advances; and when Dixon & Co. ultimately suspended payment, the balance due from them to the defendants on account of these transactions exceeded 2000*l.* The defendants thereupon claimed to be entitled to shelter themselves under the rule of law which protects payments *bona fide* made by an agent to his principal, without notice; and at the trial it was submitted on their behalf, that, being known to be brokers, and being under advances to their principals, whether the plaintiffs knew that they were acting for principals or not, they (the defendants) were entitled and bound to hand over the money to their principals, or (which was the same thing) entitled to set it off against their advances, and having done so, were not liable to be called upon to refund it: and the cases of Holland *v.* Russell[1] and Shand *v.* Grant[2] were cited.

The learned judge in his summing-up said that every agent for the sale of goods who has advanced money upon them and has them in his possession, has a right to sell them as owner, unless there be a countermand of his authority; and he distinguished the cases cited, on the ground that in both of them the persons who dealt with the agent knew that they were dealing with one who represented an undisclosed principal; whereas here the defendants, though general brokers, acted in the particular case as principals, and he directed the jury to find for the plaintiffs, damages 509*l.* 15*s.*, reserving leave to the defendants to move to enter a verdict for them, or a nonsuit, if the court should think the ruling wrong.

Quain, Q. C., moved accordingly.

Bovill, C. J. The defendants in the first instance personally claimed the price of the cotton from the plaintiffs as upon a sale to them by the defendants, each being, as between themselves, personally bound as principals in the transaction, though each were acting for principals whose names were not disclosed. The invoice was made out as upon a sale from the defendants to the plaintiffs, and claiming the price as being due to the defendants personally; and each were liable personally to the others for the due performance of the contract. The defendants were entitled to sue for and recover the price of the cotton in their own names, and to apply it when received to their own use and benefit. They had made large advances to their principals, Messrs. Dixon & Co., upon the security of the cotton, and were entitled to sell it to recoup themselves. In no sense could they be said to have received this money for the purpose of handing it over to Messrs. Dixon & Co.; nor did they in point of fact hand it over to them. It is true that the defendants were shown to have made further advances

[1] 1 B. & S. 424; 30 L. J. Q. B. 308: in error, 4 B. & S. 14; 32 L. J. Q. B. 297.
[2] 15 C. B. N. S. 324.

to Messrs. Dixon & Co. subsequently to the receipt by them of this money. That, however, could not make it money had and received by Messrs. Dixon & Co. to the use of the plaintiffs, so as to enable them to sue Messrs. Dixon & Co. for it. The mistake originated with the defendants themselves, and they alone are responsible. The cases relied on are clearly distinguishable. In Shand *v.* Grant,[1] the defendant received the money as agent of the ship-owner, and for the purpose of handing it over to him. The case was put entirely upon the ground that the defendant was a mere agent. He had handed over the money to his principal, and the principal was the proper person to sue. So, in Holland *v.* Russell, the same view was taken, and the decision proceeded upon the ground that the defendant was a mere agent. COCKBURN, C. J., in delivering the judgment of the court below, after stating what had been the contention on one side and on the other, says[2]: "We are of opinion that the plaintiff fails upon the facts. Not only is it clear that the defendant was acting solely as agent, but (the court having power to draw inferences of fact) we are of opinion that the plaintiff was aware that the defendant was acting as agent for the foreign owners, and as such made to him the payment of the money he now seeks to recover back." And, when the case came before the Court of Error, the same view was taken. ERLE, C. J., delivering the judgment of that court, says[3]: "The defendant who received this money from the plaintiff received it as agent for a foreign principal. The plaintiff knew that, and paid him in that capacity, with the intention that he should pay it over to that principal, and he did so; and all the money thus received has been accounted for in a settlement of account approved by the foreign principal, under circumstances which clearly amount to payment of that sum to him. The defendant having therefore been altogether an agent in the matter, is there anything which takes him out of the ordinary protection to which an agent is entitled who pays money to his principal before he received notice not to pay it, and before he knew that there was no legal duty on him to do so? There is nothing in this case to deprive the defendant of the right of an ordinary agent so to protect himself." Here the defendants were not mere agents. They were dealing as principals, and entitled to apply the proceeds of the sale of the cotton to their own use. For these reasons I am of opinion that the direction of the learned judge was right, and that there should be no rule.

BYLES, J. I entirely agree with what has fallen from my Lord upon the first point. The defendants did not receive the money as mere agents: they received it for their own use and benefit. In addition, I would observe that the defendants here are seeking to excuse one mistake by another. They paid over (or accounted for) the money to their employers, if not with

[1] 15 C. B. N. S. 324.

[2] 1 B. & S. 424, at p. 432; 30 L. J. Q. B. 308, at p. 312.

[3] 4 B. & S. 14, at p. 15; 32 L. J. Q. B. 297, at p. 298.

recollection, yet with notice of the facts. If they were mere agents, they were bound to remember. On both grounds, therefore, I think the verdict was right.

MONTAGUE SMITH, J. I am of the same opinion. Upon the facts appearing, the defendants were not mere agents to receive the money for Dixon & Co., and to hand it over to them. They received it on their own account, and had a right so to receive it and to appropriate it to their own use. They were not mere conduit-pipes: they were in some sense principals, and had a right to appropriate the money in satisfaction of their advances to Dixon & Co., and they did so. What is said by Lord MANSFIELD in Buller *v.* Harrison[1] seems to me to be very much in point: "The law," he says, "is clear, that, if an agent pay over money which has been paid to him by mistake, he does no wrong; and the plaintiff must call on the principal: and in the case of Muilman *v.* ———, where it appeared that the money was paid over, the plaintiff was nonsuited. But, on the other hand, shall a man, though innocent, gain by a mistake, or be in a better situation than if the mistake had not happened? Certainly not." If the argument of Mr. Quain were to prevail, the defendants clearly would be in a better position than if the mistake had not happened. They received the money and appropriated it towards satisfaction of their own debt. I think the defendants were not, to use the words of ERLE, C. J., in Holland *v.* Russell,[2] agents altogether. As between themselves and the plaintiffs, they were principals.

BRETT, J. I am of the same opinion. The defendants were originally liable because under a mistake they received money which they were not entitled to. They cannot get rid of that liability, unless they bring themselves within the rule as to an agent who has received money on account of his principal and has paid it over to him. It seems to me that they have failed to bring themselves within that rule. They did not receive this money for their principals. They stood with regard to the plaintiffs as original contractors. I should be sorry, however, to decide the case on that ground alone. The money in question was received by the defendants, not only as between the plaintiffs and themselves, but also as between Dixon & Co. and themselves, on their own account, and not on account of Dixon & Co. Being under advances, they had a right to sell the cotton and receive the proceeds on their own account. They cannot, therefore, say that they received the 509*l.* 15*s.* in question to the use of their principals; and consequently they do not bring themselves within the rule relied on. I will only add that I found my judgment entirely upon that view, and I do not rely on the ground that the money was received by the defendants through a mistake of their own.

Rule refused.

[1] 2 Cowp. 568.

[2] 4 B. & S. 16.

DURRANT *v.* THE ECCLESIASTICAL COMMISSIONERS FOR ENGLAND AND WALES.

IN THE QUEEN'S BENCH DIVISION, NOVEMBER 16, 1880.

[*Reported in Law Reports, 6 Queen's Bench Division,* 234.]

SPECIAL CASE, stated by way of appeal from the judgment of the judge of the county court of Downham in favor of the plaintiff, in an action brought to recover back an amount of tithe commutation rent-charge paid to the defendants as rectors of the rectory of Crimplesham, under a mistake of fact.

The material facts appearing in the case were the following: —

Prior to Michaelmas, 1870, certain lands in the parish of Crimplesham, in Norfolk, were held by a Mr. Hodgkinson as tenant. At Michaelmas, 1870, the plaintiff succeeded Hodgkinson in his tenancy, except as to a part of the land called Stanks, consisting of about twenty-five acres, which was cut off and thenceforward held separately. The action was brought to recover back tithe which accrued due between the 10th of April, 1874, and the first of October, 1876, in respect of Stanks, and was paid by the plaintiff to the defendants.

The defendants became owners in possession of the tithe of the parish of Crimplesham on the 10th of April, 1874. The names of the persons for the time being occupying the respective hereditaments subject to tithe were put down in the collecting book of the tithe-owner's agent, which was used by the collector at the tithe audit. When Hodgkinson gave up his tenancy the name of the plaintiff was substituted in the collecting book of the then collector for that of Hodgkinson in respect of all the lands, including Stanks. From that time until April, 1874, the collector for the lessees, and afterwards the collector for the defendants, gave notices to the plaintiff, as an occupier of lands in the parish, to pay the tithe for the lands that appeared by the collecting book to be occupied by him, without any knowledge on his or their part that the plaintiff did not occupy the land called Stanks, or that the plaintiff was not liable to pay tithe for the same, being guided simply in the notices of audit by the list above mentioned.

The plaintiff paid his tithe according to the notices, in ignorance that the amount specified in the notices included the tithe for Stanks not occupied by him. The tenant of Stanks, who was liable under an agreement with the landlord to pay tithe, was not asked to pay for that land until after the plaintiff, in April, 1877, accidentally discovered that he was paying tithe for land not in his possession, and refused to pay it any more.

The question for the opinion of the court was whether, under these circumstances, the plaintiff was entitled to recover back any and what part of the tithe so paid by him to the defendants?

F. M. White, Q. C. and *J. M. Lloyd*, for the defendants.

POLLOCK, B. I agree in the decision arrived at by the county court judge in favor of the plaintiff. If the mistake, which was common to both parties, had been discovered within a certain time after the payment the defendants could have obtained the tithe from the tenant. The fact that the mistake was not discovered in time prevents this, and so alters the position of the defendants; but there is no conduct on the part of the plaintiff such as would disentitle him from recovering in this action. In Cocks *v.* Masterman[1] the ground of the decision was that the banker should bear the loss, because he had not done that which bankers are bound to do, given notice of the forgery of the cheque when it became due. This and other similar cases proceed upon the ground of some mutual relation between the parties creating a duty on the part of the plaintiff, breach of which disentitles him from recovering. No such state of facts exists here, and the plaintiff, having paid the money under a mistake of fact, is entitled to recover it back.

HAWKINS, J., concurred. *Judgment for the plaintiff.*

THE KINGSTON BANK, APPELLANT, *v.* ROELIFF ELTINGE, PRESIDENT OF THE HUGUENOT BANK OF NEW PALTZ, RESPONDENT.

IN THE COURT OF APPEALS OF NEW YORK, JUNE 11, 1869.

[*Reported in* 40 *New York Reports*, 391.]

APPEAL from a judgment of the General Term of the third district, affirming a judgment for the defendant entered upon the decision of the court, on a trial without a jury.

The action was for money paid under a mistake of fact.

The following are the facts as found by the judge:—

On the 30th of January, 1854, the Huguenot Bank duly recovered three several judgments in the Supreme Court, viz.: One against Nicholas Elmendorf, William Masten, and Marius Schoonmaker, for $2659.29; one against N. Elmendorf and M. Schoonmaker, $2661.00; and the other against Nicholas Elmendorf alone, $1031.69; amounting in all to $6351.98; which judgments were duly docketed in Ulster county clerk's office on the same day, and executions issued thereon and delivered to the sheriff of said county on the said 30th of January, 1854, at 1 o'clock, P.M.

[1] 9 B. & C. 902.

Nicholas Elmendorf was the owner of a steamboat called the Alida, worth $19,000; and of other personal property worth $1143.99; also of real estate in said county worth $18,147.88, and the judgment debtor, Wm. Masten, owned a propeller worth $1000.

No liens or incumbrances then existed against the said property of the judgment debtors, excepting four judgments docketed in said clerk's office, viz: in favor of other parties against said Elmendorf and others, amounting in the aggregate to about $10,000; on which no executions had then been issued to the sheriff. Before the executions had run out on the said judgments in favor of the Huguenot Bank in the sheriff's hands, the real and personal property of the judgment debtor, Elmendorf, was amply sufficient to pay said judgments and all prior liens.

Subsequently and prior to March 28, 1854, other judgments in favor of various parties were recovered against Elmendorf, and on the 25th of March, 1854, the Kingston Bank recovered three several judgments against Elmendorf, Lockwood, and Schoonmaker, amounting in the aggregate to about $15,000, and thereafter judgments to a large amount were perfected by various parties against Elmendorf.

The sheriff levied on the Alida between the first and the middle of May, 1854, and on the propeller, the property of William Masten, the middle of March, 1854.

On the 17th of July, 1854, the steamboat Alida, the property of Elmendorf, was sold by the sheriff for $19,000 (and the propeller was sold at the same time for $1000), to John Van Vechten, for which sum of $19,000, Van Vechten, by the consent of the Kingston Bank, gave his note to the sheriff.

The real estate of Elmendorf was sold by the sheriff, under executions, April 10, 1855, and brought $18,171.88.

On the 20th day of July, 1854, Van Vechten paid all the judgments in favor of the defendant, the Huguenot Bank, and the same were at his request then satisfied and cancelled of record; these judgments were paid and cancelled of record by the consent of the Kingston Bank.

These payments were made from the proceeds of the sale of the Alida, under the mistake of fact that the Alida had been levied upon under the executions upon the defendant's judgments, whereas no such levy had been made; but those executions had run out in the sheriff's hands prior to any levy on the Alida. They were so paid without any fault or want of care of the defendant, and without the defendant's obtaining any advantage thereby, as the judgments of the defendant were entirely safe and secure by the real estate of Elmendorf, on which they were a lien prior to plaintiff's judgments, but by being satisfied by the payments before mentioned, the defendant's lien on the real estate was lost without fault of the defendant, and if this plaintiff recover, the defendant will probably lose its judgments. There was no fraud in the conduct of the plaintiff or the defendant, but the

plaintiff had the means of easily ascertaining the facts as to the levy prior to the payment of defendant's judgments.

As a conclusion of law, he found that the plaintiff had no cause of action.

The judgment was affirmed by the General Term.

Samuel Hand for the appellant.

Jacob I. Hardenburg for the respondent.

HUNT, Chief Justice. The judgment in this case was rendered upon a finding of facts by the judge who tried the cause, without a jury. This judgment was affirmed by the General Term. In such case the Code provides, that the findings of fact are conclusive upon us. Both parties in their briefs proceed upon the basis of the facts thus found, and the respondent expressly states, that the findings of the judge are fully sustained by the testimony. It is not competent, therefore, for the respondent to insist, as he does in his second point, that "no part of the moneys paid to the Huguenot Bank were moneys realized out of the sale of the Alida. It was all money of N. Elmendorf, the principal debtor, and upon it the Kingston Bank had no lien or claim whatever." The judge trying the cause has found, that "the judgments of the defendants were paid from the proceeds of the sale of the Alida, under the mistake of fact that the Alida had been levied upon under the executions of the defendants' judgments, whereas no such levy had been made." This finding, as the respondent admits, and it cannot be denied, is sustained by the evidence. As a fact it is conclusive upon us here. The case, then, stands thus. The defendants, having the earliest judgments against Nicholas Elmendorf and others, issued three executions upon their judgments in January, 1854. In March, 1854, the judgments in favor of the plaintiffs were recovered, and executions issued upon them to the sheriff holding the prior executions. During the life of the latter executions, but after the lien of the former had expired, by lapse of time, the steamboat Alida was levied upon, under the executions in the sheriff's hands, and sold for $19,000. Both parties supposed that the boat had been levied upon by the first executions, as well as by the later ones; the purchaser paid the first executions and the judgments were satisfied of record. This was done by the consent of the plaintiffs. The plaintiffs' executions, in consequence thereof, remained unpaid. Upon discovering the error, to wit, that the first executions had expired, and were not a lien upon the boat or its proceeds, the plaintiff demands of the defendant the money thus erroneously paid, and brings this action for its recovery.

The money thus received by the defendant was the plaintiffs' money. That it did not belong to the defendant follows necessarily. The avails of the property of a judgment debtor, when sold upon execution, are by law to be paid to the creditors upon whose execution it is sold. Their judgments and executions are thereby satisfied and discharged. Such proceeds, on the other hand, do not belong to a judgment creditor, whose exe-

cution has expired by lapse of time, and is not, therefore, a lien upon the property. Neither is such judgment impaired or affected by such sale. It may be immediately enforced by another execution upon any property, real or personal, that the debtor may possess. Gardinier *v.* Tubbs;[1] McChain *v.* Duffy;[2] Van Winkle *v.* Udall;[3] People *v.* Hopson;[4] Ostrander *v.* Walter.[5]

The defendants have received the money which should have been paid to the plaintiffs, by their assent, it is true, but which assent was based upon a mistake of fact. The principles of law will not permit the defendants to retain this money, unless there is something in the case to take it out of the general rule. The authorities to this point are numerous. Barr *v.* Veeder;[6] Wheadon *v.* Olds;[7] The Bank of Utica *v.* Van Gieson;[8] Canal Bank *v.* Bank of Albany;[9] Bank of Commerce *v.* Union Bank.[10]

So far as can be gathered from the statements of the judge trying the cause, and the opinion of the court below, their judgment in favor of the defendants was based, first, upon the idea that, by the exercise of proper diligence, the plaintiffs might have learned that the defendants' executions had expired, and thus have avoided the error; and second, that by the discharge of their judgments, the defendants had lost their lien upon the real estate of their judgment debtor, and if compelled to refund, would in fact lose their debt. I will consider each of these positions.

As to the first proposition, that the plaintiff had the means of learning the true state of the case. It cannot be denied that either party might have made inquiry, and would probably have learned the actual facts. There is no reason to suppose that the sheriff would have refused an explanation of the order and lien of the executions in his hands, if he had been called upon for that purpose. This course, however, was open to either party, and there is no more negligence in failing to obtain the knowledge, by one party, than the other. The defendants were equally bound with the plaintiffs to possess the knowledge, and if the want of it is a ground of complaint, are equally censurable with the plaintiffs for not possessing it. In The Canal Bank *v.* The Bank of Albany[9] the court say: "The conduct of both parties was *bona fide*, and the negligence or rather misfortune of both the same. It was the duty, or more properly, a measure of prudence in each to have inquired into the forgery, which both omitted. But this raises no preference at law or equity in favor of the defendants, but against them. They have obtained the plaintiffs' money without consideration, not as a gift, but under a mistake. For the very reason that the parties are equally innocent, the plaintiffs have the right to

[1] 21 Wend. 169, 171.
[2] 2 Duer, 645.
[3] 1 Hill, 559.
[4] 1 Denio, 574.
[5] 2 Hill, 329.
[6] 3 Wend. 412.
[7] 20 Wend. 174.
[8] 18 Johns. 485.
[9] 1 Hill, 287.
[10] 3 Comst. 237.

recover." (Page 290.) The same rule is laid down in The Bank of Commerce *v.* The Union Bank.[1]

Care and diligence are not controlling elements in the case. It is a question of fact merely. The inquiry is, are the parties mutually in error, and did they act upon such mutual mistake, not whether they ought so to have acted. If, in consequence of such mutual mistake, one party has received the property of the other, he must refund, and this without reference to vigilance or negligence. On a sale and purchase of real estate, the rule and the principle are different. It is a case of a bargain in which the law requires the exercise of care and attention. A party cannot then allege himself to be ignorant of a fact, of which he was put upon the inquiry, and of which he could have obtained a knowledge by reasonable diligence. In cases of bargains and sales, the rule is applicable, *vigilantibus non dormientibus leges subveniunt.* Such was the case cited of Taylor *v.* Fleet[2] and of which there are many instances in the books. But where there is no matter of contract, no bargain or sale, there is no call for the exercise of astuteness. The case then becomes one of fact. Was there or not an error between the parties? And the determination of that fact controls the result. Where this expression of the want of care and attention is used in reference to cases of simple mistakes of fact, by which one has thus received the money of another, and that it is thus used in many cases cannot be denied, the expressions have not been duly considered. In support of this view, I refer to Townsend *v.* Crowdy.[3] A. had agreed with B. to purchase his share of a partnership business, for a given sum, subject to diminution, if a moiety of the profits for three years should be less than a certain amount. Having made a partial investigation of the accounts, and believing that the profits had reached the amount named, A. paid the sum in full. Six months afterwards, a more accurate estimate having been made, it was discovered that the profits were considerably less than the estimated amount. Held, that the payment having been made under a mistake of fact, A. was entitled to recover back from B. the sum paid in excess. In ordering judgment upon the case stated, ERLE, Chief Justice, said: "I am of the opinion that our judgment in this case should be for the plaintiff. . . . It seems, from a long series of cases from Kelly *v.* Solari[4] down to Dails *v.* Lloyd,[5] that where a party pays money under a mistake of fact, he is entitled to recover it back, although he may, at the time of the payment, have had means of knowledge of which he has neglected to avail himself." WILLIAMS, J., said: "I am entirely of the same opinion. . . . Since the case of Kelly *v.* Solari, it has been established that it is not enough that the party had the means of learning the truth, if he had chosen to make inquiry. The only limitation now is, that he must not waive all inquiry." WILLES, J., concurred. BYLES, J., said: "I

[1] 3 Comst. 237. [2] 4 Barb. 95. [3] 8 C. B. N. S. 476, 492.
[4] 9 M. & W. 54. [5] 12 Q. B. 531.

am of the same opinion. . . . All the three courts have held that the right to recover back money so paid is not fettered by the condition suggested, that there shall not only be absence of knowledge but also absence of the means of knowledge of the facts."

In Kelly *v.* Solari, above referred to,[1] the plaintiff represented a life assurance company, and brought the action to recover from Madame Solari the sum paid to her on a life policy of £1,000 in favor of her deceased husband. The deceased having neglected to pay his quarterly premium in September, the directors of the company, in November following, wrote upon the policy the word "lapsed." M. Solari died in October, and in the February following, the defendant proved her husband's will, demanded the payment of the policy, and received the amount less a sum deducted for payment before maturity. The directors testified that at the time of making the payment, they had forgotten that the policy had been lapsed. At the trial the Lord CHIEF BARON expressed his opinion, that if the directors had had knowledge, or the means of knowledge, of the policy having lapsed, the plaintiff could not recover, and that their afterwards forgetting it would make no difference. He directed a nonsuit, reserving leave to the plaintiff to move for a verdict for the amount claimed. On such motion being made, Lord ABINGER, C. B., said: "I think the plaintiff ought to have had the opportunity of taking the opinion of the jury, whether in reality the directors had knowledge of the facts, and therefore, that there should be a new trial and not a verdict for the plaintiff; although I am now prepared to say that I laid down the rule too broadly at the trial, as to the effect of their having had means of knowledge." PARKE, B., concurred, saying, among other things: "The position that a person so paying is precluded from recovering by laches, in not availing himself of the means of knowledge in his power, seems from the cases cited to have been founded on the *dictum* of Mr. Justice BAYLEY, in Milner *v.* Duncan,[2] and with all respect to that authority, I do not think it can be sustained in point of law. If, indeed, the money is intentionally paid without reference to the truth or falsehood of the fact, the plaintiff meaning to waive all inquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false, the latter is certainly entitled to claim it; but if it is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been in omitting to use due diligence to inquire into the fact."

The case of Dails *v.* Lloyd, referred to in the above opinion, is reported also in 12 Ad. & E. N. S. 531. These cases show that the question of care and diligence does not arise in an action like the present.

The next proposition of the respondents is, that by the discharge of their judgments they have lost their lien upon the real estate of their judgment

[1] 9 M. & W. 54. [2] 6 B. & C. 671.

debtors, and if compelled to refund would lose their debt. To state it in another form, they insist that the claim against them cannot be maintained, unless they can be restored to their original position, and secured from the intervention of other liens and purchases. This they say cannot now be done, citing Crozier *v.* Acker.[1] That was the case of a mistake of law. The Chancellor says: "If this court can relieve against a mistake in law in any case, where the defendant has been guilty of no fraud, which is very doubtful, it must be in a case in which the defendant has lost nothing by the mistake, and where the parties can be restored to the same situation in which they were at the time the mistake happened."

The application of this principle to the present case would substantially destroy the rule that money paid in mistake of facts can be recovered by the payer from the receiver. If the facts could be so arranged, that there would be no loss to either party, there would be nothing to contend about, and no such actions would be brought. It is only where the retention or restoration of the money involves a loss that the parties are anxious about it. It is an ordinary result of the transaction, that the party receiving has incurred liabilities or paid money which he would not have done, except for the receipt of the money. I find no case, however, in which this has been held to relieve him from the performance of his duty. In the present case, the one party or the other, upon the facts found, will lose his debt. By cancelling their judgment, the respondents will have lost an available security. By failing to receive the amounts due to them upon their subsisting executions, the appellants will have lost their debt. One party or the other being compelled to lose, the question is, which shall it be. The answer given by the authorities is, that the party having the legal right must prevail. In the Canal Bank *v.* Bank of Albany,[2] which was an action by one bank to recover from the other the amount of a draft paid to it upon a forged indorsement of the name of the payee, the plaintiff recovered as for money paid by mistake, and it was held no defence to show that the defendant had collected the money as the agent of another bank in the city of New York, and had in good faith and without notice paid over the money to its principal. Here a loss was inevitable to the defendant or its principal, and it was impossible to restore them to the position of the holder of an unmatured and unprotected draft. They were held liable nevertheless.

In Bank of Commerce *v.* Union Bank,[3] the same principle is laid down and in the same manner. The Union Bank had paid to its New Orleans correspondent the money received from the plaintiff.

In Rheel *v.* Hicks,[4] a complaint had been made against the plaintiff that he was the father of a bastard child, of which one Louisa Hepe was pregnant, and upon the oath of the said Louisa. The plaintiff was arrested,

[1] 7 Paige, 137.
[2] 1 Hill, 287.
[3] 3 Comst. 230.
[4] 25 N. Y. 289.

and compromised the matter with the superintendent of the poor by paying him fifty dollars in consideration of a full settlement and release for the child's support. It turned out that the complainant was not pregnant with a child by any one, and that she was not delivered of a child at all. The plaintiff brought his action against the defendant to recover back the money paid, and recovered. This court also held that the fact that he had paid over the money to the county did not alter the case, although it was his duty so to pay over all moneys received for the support of bastards.

Neither of the propositions on which the judgment of the Supreme Court is supposed to be based can be maintained. There is nothing to except this case from the general principles applicable to its class, and, upon the facts found, the judgment should have been for the plaintiff.

The Supreme Court could readily vacate the satisfaction of the judgments and restore the defendants to their former position, so far as the judgment debtors are concerned. Should there have been *bona fide* purchases in the mean time, the case would be more complicated, and we are not called upon to say what would be the result. In any event, I think this consideration cannot prevent the plaintiffs from recovering the moneys justly due to them. Adams *v.* Smith;[1] Barker *v.* Bissinger.[2]

The judgment should be reversed and a new trial granted.

Daniels, J., dissenting. The money which formed the subject of the present controversy was derived from a sale of the steamboat Alida, made under executions issued upon judgments recovered by the plaintiff against her owner. The purchaser at the sale, by the consent of the plaintiff, made and delivered his note to the sheriff for the amount of his bid. And when the money in dispute was paid, it was paid by the purchaser upon judgments recovered against the same defendant in favor of the Huguenot Bank. At that time it was supposed by that bank, and also by the plaintiff, that the sale had in fact been made under the executions issued upon the judgments of the Huguenot Bank, and that consequently that bank had the prior right to receive the money. Under that supposition the plaintiff consented that the money should be paid upon the judgments recovered by the Huguenot Bank, and that they should be cancelled of record. This proved to be a mistake, for the executions of the Huguenot Bank had expired before the levy upon the steamboat was made. At the time when the money was paid, the judgments of the Huguenot Bank were liens upon real estate of sufficient value to pay and satisfy them. This was afterwards sold under other judgments recovered against the debtor, and the proceeds applied in payment of them. The question, therefore, arises, as one of the parties must be subjected to the loss of the money in controversy, upon whom should that loss in justice and equity be imposed? No positive wrong can be attributed to either

[1] 5 Cow. 280. [2] 14 N. Y. 270.

of them. For they each acted under the mistaken assumption of the existence of an important fact, concerning which each was equally bound to inquire. And the means of knowledge of its actual existence were equally accessible to them both.

The consequences of a recovery by the plaintiff will be precisely the same to the defendant as those arising out of the maintenance of the defendant's defence will be to the plaintiff. If the plaintiff shall succeed, it will leave the defendant's judgments to that extent unpaid, but incapable of being restored as liens upon the debtor's property. While the success of the defendant will leave the plaintiff's judgment standing against the same debtors, divested of the means of payment which the levy and sale under them had supplied them with. For while the levy continued and when it was followed by the sale, the plaintiff's judgments were *pro tanto* paid, but the payment was not an absolute satisfaction or discharge. It was still subject to the contingency that the judgments would be revived against the debtors in case actual payment was prevented, without any fault of the creditor or of the sheriff who was acting in its behalf. In this case no such fault was attributable to either. For by the mistake of the parties the money which was realized from the sale of the property, was applied in payment of other debts which its owner was equally liable to pay. No complaint, therefore, can be made by him, for he has had the full benefit of the property sold, by the application of its proceeds in the payment of his debts. And under those circumstances he could not avail himself of the technical and temporary payment made by means of the levy and sale, which was afterwards defeated by the mistaken action of his creditors without in any manner increasing his liabilities, for the purpose of preventing the future collection of the plaintiff's judgments. People *v.* Hodgson;[1] Peck *v.* Tiffany.[2] The equities, therefore, were entirely equal between the parties to this action.

It was, however, insisted by the learned counsel for the plaintiff, that his client enjoyed the legal right, and that it should prevail for that reason. In this the counsel was in error, for until the money was actually paid over, the creditor had no legal title to it. The note which was taken by the sheriff upon the sale was owned by him, for the benefit, however, of the creditor who should prove to be legally entitled to receive its proceeds. But until it, or the proceeds derived from it, were delivered over to the creditor, the latter acquired no legal title to either. As neither was ever delivered to the plaintiff, but the proceeds were paid to the defendant with the plaintiffs' consent, the latter can, in no just or proper sense, be said to own the money in dispute. The most that can be affirmed in its favor is that it was entitled to become the owner, but relinquished its right to do so in favor of the defendant. And this united the legal title with the equities then created by the cancellation of the defendant's judgments in

[1] 1 Denio, 574, 578. [2] 2 Com. 451, 456.

favor of the latter, which in equity would constitute a sufficient answer to the plaintiffs' action. For it is an established principle of that jurisprudence, that the legal title shall prevail in all transactions brought within its cognizance, where the equities prove to stand upon an equality.

The recoveries which were had in the cases relied upon by the plaintiffs' counsel were all sustained by that principle, for the evidence showed that the moneys which the defendants were required by the judgments to refund, were owned by the plaintiffs when they were received by the defendants. The legal title, as well as the equitable right, united in support of the demands made by the plaintiffs; and in addition to that, they stood precisely in the same relation to the persons who had respectively received the moneys from them, and for that reason could maintain similar, or other adequate actions or proceedings for their own reimbursement. Canal Bank *v.* Bank of Albany;[1] Bank of Commerce *v.* Union Bank;[2] Rheel *v.* Hicks.[3] Neither of these elements exist in the plaintiffs' favor in the present case, and for that reason its action to recover the money received by the defendant in consequence of the mistake does not derive any support from their authority.

This action is founded upon the equitable consideration that the defendant has received the plaintiffs' money under circumstances rendering it unjust and inequitable for it to retain it. Wherever that is shown to be the case the action should be sustained; but where, as in the present case, the money received by the defendant was not the property of the plaintiff, and was not detained against equity and good conscience, neither justice nor precedent will sustain the action brought for its recovery. In cases of this description it has long been held, and justly so, too, that the defendant "may claim every equitable allowance; in short, he may defend himself by everything which shows that the plaintiff *ex æquo et bono* is not entitled to the whole of his demand, or any part of it." Eddy *v.* Smith;[4] Wright *v.* Butler;[5] Buel *v.* Boughton.[6]

And it has, therefore, been held that the action for the recovery of money paid by mistake should not be so far extended as to allow it to be maintained where it will deprive the defendant of a right. Rathbone *v.* Stocking;[7] Moyer *v.* Shoemaker;[8] Barber *v.* Cary.[9] And this qualification of the general rule clearly includes the present case.

In the case of McDonald *v.* Todd,[10] the action was brought to recover money received by the defendant upon a judgment recovered by him under circumstances quite similar to those presented by the present case; and it was maintained solely upon the ground that the defendants' attorney had fraudulently represented the lien of the judgment on which the payment

[1] 1 Hill, 287, 294.
[2] 3 Com., 230, 237.
[3] 25 N. Y., 289.
[4] 13 Wend. 488, 490.
[5] 6 Wend. 284, 290.
[6] 2 Denio, 91.
[7] 2 Barb. 135, 145.
[8] 5 Barb. 319, 322.
[9] 11 Barb. 549, 551-52.
[10] 1 Grant (Pa.), 17.

was made, to be prior to that of the plaintiffs. GIBSON, J., who delivered the opinion of the court, held that the defendant could have retained the money if it had not been for the fraud perpetrated by his attorney.

There is no legal ground upon which a recovery by the plaintiff could be properly or justly sustained; the judgment should, therefore, be affirmed.

All the judges, except DANIELS, J., concurring with HUNT, C. J., for reversal, upon the grounds stated in his opinion,

Judgment reversed and new trial ordered.

THE UNION NATIONAL BANK OF TROY, RESPONDENT, *v.* THE SIXTH NATIONAL BANK OF NEW YORK, APPELLANT.

IN THE COURT OF APPEALS OF NEW YORK, JANUARY 24, 1871.

[*Reported in* 43 ~~*Comstock*~~ 2d, 452.]

APPEAL by the defendant from a judgment of the late General Term of the Supreme Court in the third district, affirming a judgment for the plaintiff upon the report of Justice INGALLS, as referee.

The action was by the plaintiff, a bank doing business in the city of Troy, to recover a sum of money alleged to have been paid by it, under a mistake of fact, to the defendant, a bank in the city of New York.

The facts, as they appear by the referee's finding and the evidence, are these: —

The defendants, having discounted for one Cregan a note of one Bassett to Ashley, for $1000, which was dated September 26, 1865, at four months, payable at the Columbia Bank, Chatham Four Corners, indorsed by the payee, and by Davidson and Cregan, sent it before it was due to the plaintiffs for collection. The plaintiffs sent it to the Columbia Bank at Chatham, about thirty miles from Troy. It was not paid on the 29th of January, 1866, when it became due, but protested, and notice of its protest was mailed by the Columbia Bank to all parties on it. The defendants, upon the receipt of the notice, applied to Cregan, and he paid them the note and took it up on the 5th of February, 1866. He did not receive the note, as it was not returned by the plaintiffs. On the same 5th of February, the plaintiffs, not having received the notice of protest from the Columbia Bank, and believing that the note was paid, remitted the amount to the defendants. The defendants received the remittance of the amount of the note on the 6th of February, and supposing that the note had been paid after its protest, at once refunded the amount received by them to Cregan, the indorser. The maker and payee both resided at Chatham. The indorsers Davidson and Cregan resided in New York. On

the 9th of February the plaintiffs for the first time wrote to the Columbia Bank, inquiring about the note. On the 10th the Columbia Bank returned to the plaintiffs the note protested, and plaintiffs then sent the same to the defendants, who received it on the 12th. The plaintiffs then claimed from defendants the money sent for the note. They declined because they had paid it over to Cregan, who refused to return it, and because they were not liable. The plaintiffs then, under an arrangement with the defendants, undertook to collect the note from the maker, but did not carry the same into effect. Cregan has died insolvent. He alleged that he had parted with security on receiving the money from the defendants, and refused to pay back to them what they paid him. There was no proof, however, of this.

Samuel Hand and *James Emott* for the appellants.

Charles F. Tabor for the respondent.

Folger, J. The rule established by the class of cases of which The Kingston Bank *v.* Eltinge [1] is one, is not questioned by the counsel for appellants. But he insists that there is a distinction between them and the case in hand. Admitting that there was a mutual mistake in supposing that the note was paid, when it was not paid, he claims that the respondents were negligent in not making inquiry and using the means at their hand for arriving at correct information of the facts. But as a sufficient answer to this, it is held that it is no bar to an action that the party paying had the means of knowing, and might have availed himself of those means by care and attention, and thus have arrived at exact knowledge. Waite *v.* Leggett.[2]

"Care and diligence are not controlling elements in the case. It is a question of fact merely. The inquiry is, Are the parties mutually in error, and did they act upon such mutual mistake? Was there or not an error between the parties? And the determination of the fact controls the result." Kingston Bank *v.* Eltinge.[1]

If the money "is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been in omitting to use due diligence to inquire into the fact." Kelly *v.* Solari;[3] Marriott *v.* Hampton.[4] If it were conceded that the plaintiffs were subject to the imputation of negligence, that alone would not bar their action.

The appellant's counsel urges, however, that the plaintiffs were the agents of the defendants; that it was their duty to collect the note and remit the proceeds, or to return promptly the protested paper. They did not fail in the first branch of this duty, for the note was not paid; nor did they fail in making protest, etc., of the note. For that was done by which all prior indorsers to the defendants were charged. Notice of non-payment

[1] 40 N. Y. 391.
[2] 7 Cow. 195.
[3] 9 M. & W. 54.
[4] 2 Sm. L. C. 403, notes.

was also given to the defendants. It would not be claimed, if the transaction had stopped here, that the defendants would have any cause of complaint against the plaintiffs. It must be remembered that the notice of non-payment meant for the plaintiffs was lost from or miscarried in the mail. They were authorized to act upon the natural inference from the usual course of business, that, no notice having been received of non-payment of the note, payment had been made.

There was thus far no failure of duty to the defendants. And the case stands the same as if the relations of the plaintiffs and defendants were not those of agent and principal. And the omission on the part of the plaintiffs to make inquiry and obtain correct knowledge is no more prevalent against them than it would be if they had not been the agent of the defendants.

The appellant's counsel makes the point also that the defendants, relying upon the act of the plaintiffs and paying over the money to Cregan, from whom they cannot recover it, have been irreparably injured, and that the plaintiffs are estopped from denying their assertion to the defendants that the note had been paid. The facts bearing upon this must be considered as they existed on the day on which the plaintiffs first sought from the defendants repayment of the money. This was about the 11th of February, 1866; and for some time subsequent thereto, Cregan was a dealer with the defendants and had on deposit with them an average amount large enough to have met this payment, and the amount of the note could have been charged against this deposit. It is said that Cregan refused to repay the money, alleging that, believing the note had been paid, he had parted with collateral security. But this is not proven. And the findings of the referee put the refusal of the defendants to repay on the ground that Cregan could not be required to pay the note. There is no fact found or proven which shows this, or establishes that the maker and indorsers of the note were not on that day just as liable to the defendants as they were at the maturity of the note. Troy City Bank *v.* Grant;[1] Wilkinson *v.* Johnson.[2] The defendants, having at the time of the plaintiffs' demand upon them for repayment all the means of securing themselves from loss which they had on the day on which the note matured, and thus being in the same situation in which they were before the payment by the plaintiffs, cannot claim that they were immediately injured by the act of the plaintiffs. When injury does not necessarily result, it is wholly immaterial as respects the plaintiff's right to recover. And it is for the defendants to show that injury has resulted. Guild *v.* Baldridge.[3] And see Rheel *v.* Hicks.[4]

The judgment of the General Term should be affirmed with costs to the respondent.

[1] Lalor, Supp. 119.
[2] 3 B. & C. 428.
[3] 2 Swan, 295–304.
[4] 25 N. Y. 289.

CHURCH, C. J., and ALLEN and GROVER, JJ., concur. ALLEN, J., expressly on the ground that the defendants did not necessarily sustain loss by the mistake. They were notified in time to reclaim the money of Cregan, and there is no evidence to show that the situation of Cregan or the defendants has been changed in the mean time, or that either had parted with any security.

ANDREWS, J., absent. PECKHAM, J., having been a member of the court below, did not sit.

LEONARD D. WHITE *et al.*, APPELLANTS, *v.* THE CONTINENTAL NATIONAL BANK, RESPONDENT.

IN THE COURT OF APPEALS OF NEW YORK, MARCH 21, 1876.

[*Reported in* 64 *New York Reports*, 317.]

APPEAL from judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, affirming a judgment in favor of plaintiffs entered upon a verdict, and affirming an order denying a motion for a new trial.

This action was brought to recover back money paid by plaintiffs to defendant, upon an altered sight draft drawn upon plaintiffs by their correspondent in Buffalo.

The draft was drawn for the sum of twenty-seven dollars. After its delivery to the payee, and before presentation and acceptance, it was altered so as to change the amount to $2750. It was sent by one Horton, of Baltimore, to Austin Baldwin & Co., New York, and received by them August 16, 1869. That firm deposited it on the same day with defendant, and for its avails sent to Horton a sterling bill of exchange on London at sixty days. Defendant credited said firm the amount of the draft. The draft was presented, August 17, to and accepted by plaintiffs, payable at the Leather Manufacturers' Bank, by whom it was paid to defendant. In the regular course of business between plaintiffs and the drawer of the draft, monthly statements of accounts were rendered. The August account was rendered the forepart of September. It was not examined by the drawer until October 5, when the alteration was first discovered. Plaintiffs were advised on the 6th, and immediately notified defendant.

The court charged among other things: "If the jury believe from the evidence, that if Austin Baldwin & Co. had been, either directly by the plaintiffs or by them through the defendants, informed within a reasonable time after the acceptance of the draft by the plaintiffs, that the same was forged for an amount exceeding the sum of twenty-seven dollars, they,

Austin Baldwin & Co., or the defendants, could have taken steps to trace and arrest the crime in its consummation, and have prevented the acceptance of their bill of exchange on the City Bank of London, and that they failed to take either of such steps, by reason of the acceptance and payment of the draft in question by the plaintiffs, and the failure of the plaintiffs to advise them of such forgery until on or about October 6, 1869, then the plaintiffs are estopped from denying the genuineness of the draft in question, and that the defendants are entitled to a verdict." To which the plaintiffs' counsel excepted.

Plaintiffs' counsel requested the court to charge, that plaintiffs were not bound to know that this draft had been altered in the way it was altered; and that all they were bound to know when they accepted it was that the signature to the draft was genuine. Also, that if the plaintiffs were not legally chargeable with knowledge of the fact that the draft had been altered, no duty devolved upon them to give any earlier notice than was given, either to Austin Baldwin & Co. or anybody else, of the fact of the alteration.

The court declined so to charge, and the plaintiffs' counsel excepted.

Hamilton Odell for the appellants.

Wm. Allen Butler for the respondent.

ALLEN, J. The right of a party paying money to another under a *bona fide* forgetfulness or ignorance of facts, to recover it back from one who is not entitled to receive it, is well established. The equitable action for money had and received will lie against one who has received money which in conscience does not belong to him. Kelly *v.* Solari;[1] The Bank of Orleans *v.* Smith.[2]

The doctrine has been applied repeatedly, in cases analogous to the present. Bank of Commerce *v.* The Union Bank;[3] The Continental National Bank *v.* The National Bank of the Commonwealth;[4] National Bank of Commerce *v.* National Mechanics' Banking Association;[5] The Marine National Bank *v.* The National City Bank.[6]

That the plaintiffs in this action paid to the defendant, professing to be the holder of the bill, the face of it, in ignorance of the facts disentitling the defendant to receive the same, is not disputed. Their right to recover the money thus paid must be unquestioned, unless their right is barred by some circumstance which takes the case out of the general rule, or by some act of their own they have lost the right.

Certain general principles, applicable to commercial paper and regulating the rights and obligations of the several parties thereto, are very familiar and of every-day application.

First. The plaintiffs, as drawees of the bill, were only held to a knowledge of the signature of their correspondents, the drawers; by accepting

[1] 9 M. & W. 54. [2] 3 Hill, 560. [3] 3 Comst. 230.
[4] 50 N. Y. 575. [5] 55 N. Y. 211. [6] 59 N. Y. 67.

and paying the bill they only vouched for the genuineness of such signatures, and were not held to a knowledge of the want of genuineness of any other part of the instrument, or of any other names appearing thereon, or of the title of the holder. Kelly *v.* Solari;[1] Broom's Legal Maxims, 257; National Park Bank *v.* The Ninth National Bank;[2] Merchants' Bank *v.* State Bank;[3] Espy *v.* The Bank of Cincinnati;[4] Goddard *v.* The Merchants' Bank.[5]

Second. The defendant, as holder of the bill and claiming to be entitled to receive the amount thereof from the drawees, was held to a knowledge of its own title and the genuineness of the indorsements, and of every part of the bill other than the signature of the drawers, within the general principle which makes every party to a promissory note or bill of exchange a guarantor of the genuineness of every preceding indorsement, and of the genuineness of the instrument. Erwin *v.* Downs;[6] Turnbull *v.* Bowyer;[7] Story on Promissory Notes, §§ 135, 379, 380, 381. The presentation of the bill, and the demand and receipt of the money thereon, was equivalent to an indorsement. The drawees had a right to act upon the presumptive ownership of the defendant as the apparent holder.

The facts which disentitled the defendant to receive the money, and in ignorance of which it was paid, were those presumed to be within the knowledge of the defendant and not of the plaintiffs. The defendant, in receiving the money and in disposing of it, did not act upon the faith of any admission by the plaintiffs, express or implied, of any fact which they now controvert in prosecuting this action. There was, therefore, no want of good faith, no negligence, or even want of ordinary care on the part of the plaintiffs in the payment of the money. The defendant, in the entire transaction, acted upon other evidence of its right to the money than the statement or actions of the plaintiffs, and in dealing with the bill and with the money, its avails, acted upon the apparent title and genuineness of the instrument, and the responsibility of those from and through whom it received the bill. The plaintiffs, therefore, owed no duty to the defendant in respect to the forgery which invalidated the bill and its title to the moneys represented by it.

It follows that there could be no negligence on the part of the plaintiffs which could defeat their right to reclaim the money paid whenever the forgery and the consequent mistake in the payment were discovered. Owing no duty and making no misrepresentation, there was no estoppel to bar the action. The case is distinguishable from The Continental National Bank *v.* The National Bank of the Commonwealth,[8] in this, that in the case cited the officer of the bank pronounced a forged certification of a check to be genuine, upon which the payee of the check relied, as he had a right to

[1] 9 M. & W. 54.
[2] 46 N. Y. 77.
[3] 10 Wall. 604.
[4] 18 Wall. 604.
[5] 4 Comst. 147.
[6] 15 N. Y. 575.
[7] 40 N. Y. 456.
[8] 50 N. Y. 575.

do, and thus relying neglected to take the means then in his power to retrieve his position and save himself from loss. The court held that the circumstances created an equitable estoppel, and that the bank could not thereafter gainsay the genuineness of the certification which it had adopted and upon which the other parties had acted. It will be seen that this estoppel was based upon the admission of a fact peculiarly within the knowledge of the bank upon which the check was drawn, and which it was bound to know, and upon a positive assertion upon which the other party had a right to and did rely. In this case, as we have seen, the plaintiffs made no assertion of any fact within their knowledge, and the defendant did not act or forbear to act upon the faith of anything which the plaintiffs said or did or omitted to say or do.

Again, in the case cited, had the teller of the certifying bank disclaimed the forged certification and pronounced it a forgery when presented, the holder of the check would have had ample time to arrest the swindler at the bank of the State of New York, before, as the evidence showed, he had received the money on the gold checks, and before he went to the sub-treasury with his gold certificates.

In the case at bar, it is the merest conjecture, with scarcely a possibility to support it, that the defendant, or those from whom it received the bill, could at any time after the transmission of the foreign bill of exchange to Baltimore, have taken any effectual measures either for arresting the swindler or reclaiming the bill bought and paid for upon the credit of the bill. Estoppels cannot be based upon mere conjectures, even if a proper foundation is laid for them in other respects. There is nothing really in the case to distinguish it from The National Bank of Commerce *v.* The National Banking Association,[1] in which the plaintiff recovered.

Should this action be retried other questions may arise not presented by this record, growing out of the relations between the defendant and other parties, and the character in which the defendant acted, whether as agent or principal. Upon the present record the equities are with the plaintiffs. If they fail to recover, they lose the money absolutely and without legal fault on their part. If the defendant is compelled to reimburse the plaintiffs, it has its remedy over against the prior indorsers; and if they in turn have no remedy against the prior indorsers, it is because they have chosen to deal with irresponsible persons, or those of whose character and responsibility they were ignorant. It would be unjust to father the consequences of their method of dealing upon innocent third persons. But waiving the question as to the responsibility of the defendant for the genuineness of the instrument, and taking the most favorable view for the defendant, which is to regard it as the case of a mutual mistake, in respect to which neither was in fault, and in that view, and upon that theory, the case is within the principles decided in The Bank of Commerce *v.* The Union

[1] 55 N. Y. 211.

Bank ;[1] The Kingston Bank *v.* Eltinge,[2] and the plaintiffs are entitled to a new trial.

Upon the case as made and upon the exceptions taken at the trial, I am of the opinion that the judgment should be reversed, and a new trial granted.

MILLER, J. (dissenting). The principle is well settled that money paid under a mistake of fact may be recovered back, although the party paying the same has been negligent in making the mistake, unless the payment has placed the other party in such a position as would render it unjust to require him to refund.

Having this doctrine in view the question arises whether the defendant was liable to refund the avails of the altered draft within the rule stated, under the circumstances presented in this case. The draft in question was accepted by the plaintiffs upon the seventeenth day of August, and it is claimed that the defendant, relying upon the plaintiffs' acceptance, lost the means and opportunity of stopping payment of the sterling bill of exchange which had been issued in lieu of the forged draft, by the plaintiffs' omission to inform the defendant of the forgery, and that the question of fact whether such a change of position had taken place as affected the defendant's rights, was properly submitted to the jury by the judge upon the trial. The charge assumed that both parties acted in good faith, and that negligence could not be imputed to either in dealing with the forged draft, and in this respect the judge charged substantially that if the defendant, upon being advised on the seventeenth day of August, could have taken precautionary measures which would have prevented it from sustaining this loss, then the plaintiffs could not recover. This rule as the case stood was not erroneous, and can be upheld within the authorities. Conceding that the acceptance of the draft falls within the rule, that by a certification of a check the drawer is concluded only as to the signature of the drawee and his own certification, and that he is not bound to know the handwriting of the filling up, yet, when, by means of his omission to act, a loss is sustained, the party in fault shall bear that loss. This doctrine was upheld and is within the ruling in the case of The National Bank of Commerce *v.* The National Mechanics' Bank.[3] In that case the check in controversy was altered after it was certified, by raising the amount, and it was held that the sum paid could be recovered unless it was shown that the holder has suffered loss in consequence of the mistake. It is said, in the opinion by Judge RAPALLO : "If the defendant had shown that it had suffered loss in consequence of the mistake committed by the plaintiff, as, for instance, if, in consequence of the recognition by the plaintiff of the check in question, the defendant had paid out money to its fraudulent depositor, then clearly to the extent of the loss thus sustained the plaintiff should be responsible." It appeared that the money was paid before the

[1] 3 Comst. 230. [2] 40 N. Y. 391. [3] 55 N. Y. 211.

check was presented to the plaintiff, and that the loss had been fully incurred by the defendant before the plaintiff had made the mistake which it sought to have corrected. It will be observed that the case differs materially from the one at bar, for here the acceptance was made by the plaintiffs after the draft had been altered, and not before, as in the case cited, and it cannot be doubted that the mistake committed by the plaintiffs by the recognition of the draft caused the defendant to pay the money. It was, therefore, a fair question for the jury whether the loss might not have been averted in season by notice of the forgery.

The case is also brought by the testimony within the distinction taken by some of the judges in The Union Bank of Troy *v.* The Sixth National Bank of New York,[1] that where the defendant necessarily sustains loss by the mistake, unless notice in time to prevent such loss is given, no recovery can be had. It was not necessary to establish that the defendant relied entirely upon the plaintiffs' acceptance to entitle it to claim the benefit of an estoppel; for even if, in consequence of it, he refrained from using means which he had in his power to prevent the loss finally sustained, the right of estoppel will be upheld and the loss must fall on the party who caused it. Continental National Bank *v.* National Bank of the Commonwealth.[2] The plaintiffs, by failing to take the means to advise the defendant, are brought directly within the rule that when the omission of a party affects the act of another, and he is thereby misled and influenced to his prejudice, the party in fault must bear the loss. The claim that the question submitted to the jury which has been discussed was not material, and that there was no evidence to guide the jury in determining it, is not well founded. It is not difficult to see that the draft given may have been stopped, the forger arrested, the acceptance in London have been prevented, or some measures have been adopted which would have saved all parties from loss, if the defendant had been notified of the forgery; and it was proper for the jury to decide this question of fact.

While the instructions to the jury asked by the plaintiffs' counsel and refused contained legal propositions which were abstractly entirely correct in a proper case, neither of them were applicable to the question of fact, which was for the jury, and therefore each of them was properly refused.

There was no error in the admission of evidence or in any of the rulings upon the trial, and the judgment should be affirmed, with costs.

For reversal: Allen, Rapallo, Andrews, and Earl, JJ.

For affirmance: Miller, J.; Church, Ch. J., and Folger, J., not voting.

Judgment reversed.

[1] 43 N. Y. 452. [2] 50 N. Y. 575.

SECTION II.

FAILURE OF DEFENDANT TO PERFORM CONTRACT.

(*a.*) *Defendant relying on Statute of Frands.*

HOLLIS *v.* EDWARDS AND ANOTHER.

IN CHANCERY, BEFORE SIR FRANCIS NORTH, L. K., MAY 1, 1683.

[*Reported in* 1 *Vernon*, 159.]

IN these cases, bills were exhibited to have an execution of parol agreements touching leases of houses, and set forth that in confidence of these agreements the plaintiffs had expended great sums of money in and about the premises, and had laid the agreement to be that it was agreed the agreements should be reduced into writing. The defendants pleaded the statute of frauds and perjuries.

For the plaintiffs it was insisted on the saving in the act of parliament; viz., Unless the agreement were to be performed within the space of a year: but it was answered, that clause did not extend to any agreement concerning lands or tenements. Then it was insisted for the plaintiffs, that undoubtedly they had a clear equity to be restored to the consideration they had paid, and to the money which they in confidence of the agreement had expended on the premises.[1]

As touching that matter, it was said by the LORD KEEPER, that there was a difference to be taken, where the money was laid out for necessary repairs or lasting improvements, and where it was laid out for fancy or humor; and that he thought clearly the bill would hold so far, as to be restored to the consideration: but he said, the difficulty that arose upon the act of parliament in this case was, that the act makes void the estate, but does not say the agreement itself shall be void; and therefore, though the estate itself is void, yet possibly the agreement may subsist; so that a man may recover damages at law for the non-performance of it; and if so, he should not doubt to decree it in equity: and therefore directed, that the plaintiffs should declare at law upon the agreement, and the defendants were to admit it, so as to bring that point for judgment at law; and then he would consider what was further to be done in this case.

[1] As to latter point, see *infra*. — ED.

GRAY *v.* HILL.

AT NISI PRIUS, BEFORE BEST, C. J., JUNE 20, 1826.

[*Reported in Ryan & Moody*, 420.]

ASSUMPSIT, on a special agreement, to assign to the plaintiff a lease of certain premises, of which the defendant was possessed, in consideration that the plaintiff would put the premises in good and sufficient repair, within the covenant of the defendant in the lease. Averment, that the plaintiff did put the premises in repair, and breach, that the defendant refused to assign the lease. There was a count for work and labor, and the usual money counts.

It was proved, that the premises had been admitted by the defendant to be in extreme want of repair, and that the landlord had given the defendant notice of his intention to sue him on the covenant, unless the premises were put into sufficient repair within a certain time. Upon this it was verbally agreed between the plaintiff and the defendant, that the plaintiff should repair the premises, and the defendant would assign his lease to him. The plaintiff expended a considerable sum of money on the premises, and put them in complete repair. Upon his demanding an assignment of the lease the defendant refused.

Vaughan, Serjt., for the defendant, contended, that the agreement was void under the statute of frauds, and the plaintiff could therefore not recover damages for the breach of it; the plaintiff undertook the repairs under the promise of an assignment, which promise was not binding.

Wilde, Serjt. The defendant has had the benefit of the plaintiff's labor, and money expended at his request, and though he is not legally liable to assign the lease, the law upon his refusal implies a promise to compensate the plaintiff.[1]

BEST, C. J. *The objection is a most dishonest one, but, if legal, must prevail.* The 4th section of the statute is decisive against the plaintiff on the special count, but I think the plaintiff entitled to a verdict on the others. The plaintiff has expended this money for the benefit, and at the instance of the defendant; the law will therefore imply a promise not touched by the statute, nor within the danger of perjury guarded against by it; the agreement is executed on the part of the plaintiff, and the defendant is legally liable to remunerate him for what he has done.

The cause was then referred.

Wilde, Serjt., and *Chitty* for the plaintiff.

Vaughan, Serjt., and *Justice* for the defendant.

[1] 2 Phillipps's Evidence, 67.

KNOWLMAN *v.* BLUETT.

IN THE EXCHEQUER CHAMBER, JUNE 12, 1874.

[*Reported in Law Reports, 9 Exchequer*, 307.]

Appeal by the defendant from a decision of the Court of Exchequer refusing a rule to enter a nonsuit.[1]

THE defendant, who was the father of seven illegitimate children of the plaintiff, agreed with her verbally to pay her 300*l.* per annum, by equal quarterly instalments, for so long as she should maintain and educate the children. At the time of the making of the promise the eldest child was about fourteen years old. For several years the plaintiff maintained and educated the children, and the defendant paid the agreed sums. At Michaelmas, 1870, he discontinued his payments. The plaintiff continued to maintain and educate the children, and in May, 1873, brought an action for two and a half years' arrears.[2]

Arthur Charles, *Cole*, Q. C., and *Lopez*, Q. C., with him, for the defendant.

Folkard, *St. Aubyn* with him, for the plaintiff, was not called on.

BLACKBURN, J. We are of opinion that the Court of Exchequer was right in refusing a rule in this case. The bargain between the parties was that if the plaintiff would take care of and maintain the children, the defendant would pay her 300*l.* a year as long as she did so. This arrangement was never revoked, and the plaintiff having taken care of and maintained the children, now sues for arrears due to her. It is said that the action is not maintainable because there is no memorandum in writing of the bargain. But the plaintiff has performed her part of it, and it would be unjust if she could not obtain repayment of the sums she has expended. She could have maintained an action for "money paid at the defendant's request," and it would have been no answer to have said that the term in respect of which she was suing was longer than a year, and that the agreement which fixed the rate of remuneration was one not to be performed within a year. We think that in substance her present claim is for money paid, although the declaration is in form upon a special contract.

KEATING, MELLOR, LUSH, GROVE, and ARCHIBALD, JJ., concurred.

Judgment affirmed.

[1] L. R. 9 Ex. 1.

[2] This statement of facts is taken from the head notes. — ED.

PULBROOK *v.* LAWES.

IN THE QUEEN'S BENCH DIVISION, JANUARY 19, 1876.

[*Reported in Law Reports,* 1 *Queen's Bench Division,* 284.]

DECLARATION that the plaintiff and the defendant agreed that the defendant should grant to the plaintiff, and that the plaintiff should accept of the defendant, a lease of a dwelling-house in Seven Sisters Road, for seven, fourteen, or twenty-one years, upon condition that the defendant should carry out certain suggestions of the plaintiff as to certain specified alterations and improvements in and to the dwelling-house, the plaintiff to pay 75*l.* towards the alterations and improvements, at the yearly rent of 120*l.*, and that before the execution of the lease the defendant should execute the alterations and improvements, and all conditions were fulfilled, etc., to entitle the plaintiff to have the alterations and improvements executed by the defendant, yet the defendant has not executed the alterations and improvements, etc., whereby the plaintiff has been deprived of the said lease, and divers expenses incurred by the plaintiff in preparing to take possession of the house and in making certain alterations and improvements in anticipation of the said alterations and improvements being executed by the defendant, by his permission, became wholly lost and useless to him.

Common counts for work done and materials provided by the plaintiff for the defendant, for money paid, and money due upon accounts stated.

Pleas, as to first count, denial of the agreement and the breaches. As to the common counts, never indebted. Joinder of issue.

At the trial a verdict was taken for the plaintiff, subject to the award of an arbitrator, who stated the following case : —

1. The plaintiff is an attorney and solicitor, and the defendant is a cabinet-maker. The plaintiff, in a letter dated the 20th of May, 1873, proposed to take a lease of one of the defendant's houses if he would carry out certain suggestions and alterations contained in the letter. A correspondence ensued between the parties, and it was ultimately agreed between them that certain alterations should be done, the plaintiff to pay a sum of 75*l.* towards them.

2. The plaintiff wished to have the drawing-room painted in a particular way, and the defendant consented that he should send in his own workmen to paint it, and he accordingly did so. Gas-pipes were laid down by the plaintiff, and certain alterations and improvements were made by him with the defendant's knowledge and consent, and with a view to the plaintiff's occupancy of the premises. In anticipation of the house being handed over to him in accordance with the terms proposed in the letter of the 20th of May, and subsequent letters, the plaintiff ordered certain gas fittings,

cornices, and blinds to be made to fit the house, and paid certain sums of money for work done and materials provided at the defendant's request for decorating the drawing-room and making the agreed alterations.

3. From divers causes the alterations and suggestions proposed by the plaintiff and agreed to be done by the defendant were so long in being carried out by the defendant (and never were in fact fully carried out) that the plaintiff was compelled to decline to take the house; the fittings for gas, cornices, and blinds which he had had expressly made for the house he was obliged to sell at a loss; and the money he paid for work and labor done at the defendant's request was also lost to him.

4. It is alleged on the part of the defendant that certain letters to be found in the appendix to this case form no agreement so as to satisfy the requirements of the 4th section of the Statute of Frauds,[1] and this question, at the request of the defendant, is submitted for the consideration of the court.

5. In the event of the court being of opinion that the point is sustainable, and goes to the whole declaration, then the arbitrator directed a verdict to be entered for the defendant generally.

6. In the event of the court being of opinion that the objection goes to the first count only, then he directed a verdict to be entered for the defendant on the first count, and for the plaintiff on the money counts for 51*l.* 3*s.*

7. In the event of the court being of opinion that the point raised must fail, then he directed that a verdict be entered for the plaintiff on the first count for 40*l.*, and on the money counts 51*l.* 3*s.*

Horace Brown, *W. G. Harrison* with him, for the plaintiff.

Baylis, Q. C., *T. E. Baylis* with him, for the defendant.

BLACKBURN, J. I think that when we get over the difficulty of understanding the question which has been submitted to us the law is tolerably clear. The plaintiff and the defendant wrote certain letters, and had certain interviews as to a house of the defendant, and the result of these letters and interviews was that the plaintiff proposed to take a lease of the house if the defendant would carry out certain improvements and alterations. Some of these improvements and alterations were completed, and then I think the case finds as a fact, that it was agreed that a lease should be granted, that the rest of the alterations should be executed by the defendant, but that the plaintiff should pay 75*l.* towards them. The first question is, whether the letters between the plaintiff and defendant are a sufficient memorandum in writing to enable the plaintiff to maintain an action on the agreement to grant a lease. [The learned judge referred to the letters, and expressed his opinion that they were insufficient to constitute such a memorandum.] I think, therefore, that as regards that part of his claim the plaintiff is not entitled to recover.

[1] It is not necessary to set out these letters.

But then comes another question. The plaintiff wished to have the drawing-room painted in a particular way, and the defendant consented that the plaintiff should send in his own workmen to paint it, and he accordingly did so. It is said by Mr. Baylis that this painting was not one of the terms of the agreement, and that it was fanciful painting and of no benefit to the house. But the arbitrator, no doubt, took into consideration the question whether there was any benefit to the premises or not. He says "The plaintiff wished to have the drawing-room painted in a particular way, and the defendant consented that he should send in his own workmen to paint it, and he accordingly did so." He further says, "Gas-pipes were laid down by the plaintiff, and certain alterations and improvements were made by him with the defendant's knowledge and consent, and with a view to the plaintiff's occupation of the premises;" and, further, "In anticipation of the house being handed over to him, the plaintiff ordered certain gas-fittings, cornices, and blinds to be made to fit the house, and paid certain sums of money for work done and materials provided at the defendant's request for decorating the drawing-room, and making the agreed alterations." Then follows this statement: "From divers causes the alterations and suggestions proposed by the plaintiff and agreed to be done by the defendant were so long in being carried out by the defendant (and never were in fact fully carried out) that the plaintiff was compelled to decline to take the house; the fittings for gas, cornices, and blinds, which he had had expressly made for the house, he was obliged to sell at a loss; and the money he paid for work and labor done at the defendant's request was also lost to him." This statement is not clearly expressed, but I think that it must be taken to mean that through the defendant's default the plaintiff was prevented from taking possession of the house.

Now, if the plaintiff had gone into possession, and paid 75*l.*, and had afterwards been turned out, either from the defendant's default or in any other manner, could not he have brought an action to recover back the 75*l.*? I think he could, for it was money the consideration for which had totally failed. Instead of this, it appears that in the present case the defendant had arranged to make the alterations himself, but that the plaintiff did part of them in his place. I think that so far as the plaintiff did the work instead of the defendant, it was equivalent as between the parties to payment. If the agreement had continued, the plaintiff could not have sued for the 75*l.*; but when the contract goes off, it is exactly the same thing as if the consideration had failed, and the plaintiff is entitled to recover the value of what the defendant has received under a *quantum meruit*. It is clear that he is entitled to recover something, and here the arbitrator has fixed the amount. The argument of Mr. Baylis is, that as the agreement is one concerning an interest in land, and is not in writing, it cannot be given in evidence. But an agreement which cannot be put

in evidence, such as an unstamped document, may be looked at for a collateral purpose. It would be very unjust if the plaintiff were not paid for what he has done at the defendant's request simply because the Statute of Frauds prevents the agreement from being given in evidence, and, in spite of the Act, I think he may recover under a *quantum meruit*.

Several cases were cited on behalf of the defendant. One of these is Cocking *v.* Ward.[1] But that case was decided before the Common Law Procedure Acts came into operation, and when there was not the same power of amending the special count as there is now; the court, however, held that the plaintiff might recover the money due to her under the count for accounts stated. Now there are many cases which establish that no account can be stated, unless in respect of a debt. In Cocking *v.* Ward,[1] there could not be a count for land sold and delivered, and they had to resort to a subsequent acknowledgment to support the count for accounts stated. But now-a-days, when a liability is proved, the plaintiff is not defeated through a mistake in his pleadings; and though this may lead to some looseness, I think it is much more calculated to promote justice. Under a *quantum meruit* the plaintiff may recover, and the defendant cannot retain the benefit without paying the price.

Lush, J. I am of the same opinion. The facts of this case are that the defendant agreed to grant a lease of a house to the plaintiff for seven, fourteen, or twenty-one years, and it was at first part of the agreement that the plaintiff should pay 75*l.* towards certain alterations in the house. Afterwards, the defendant agreed that the plaintiff should send in his workmen to paint the drawing-room in a particular manner. Now, it seems to me quite clear that the agreement between the plaintiff and the defendant was never expressed in writing so as to satisfy the Statute of Frauds. The plaintiff cannot, therefore, bring an action on the agreement; but the question remains, can he, under the common counts, recover the amount which he has expended on the house according to the finding of the arbitrator. Now, it seems to me, that what the plaintiff did was very much as if he had paid the 75*l.* into the hands of the defendant after the making of the agreement, in which case he would clearly be entitled to recover back the money. I cannot see that the fact that he has expended the money upon the improvement of the house with the consent of the defendant can make any difference.

I quite feel that in deciding as we do, we are going counter to Hodgson *v.* Johnson.[2] There the defendant, tenant of a brick-yard, agreed verbally with the plaintiff that the plaintiff should go into possession, taking the plant and bricks at a valuation, and the defendant was to pay the rent due from him. It was held that the plaintiff, though he had gone into possession, and had his goods sold under a distress, could not recover under the

[1] 1 C. B. 858; 15 L. J. C. P. 245.

[2] E. B. & E. 685; 28 L. J. Q. B. 88.

agreement to pay the rent, as it was not in writing. But the only point taken before the court was whether the agreement to take the bricks could be severed from the agreement as to the occupation. It is strange that the court seems to have overlooked the fact that, quite independently of the agreement to transfer the lease, the circumstances of the case originated a claim for compensation. If the point were to arise again, I am inclined to think that the decision would not be followed. This being so, I think the plaintiff is entitled to recover back the money which he has paid, as on a failure of consideration.

Judgment for the plaintiff.

NATHANIEL S. GREER *v.* AMOS GREER.

IN THE SUPREME JUDICIAL COURT OF MAINE, JULY TERM, 1840.

[*Reported in* 18 *Maine Reports*, 16.]

THE action was assumpsit, wherein the plaintiff alleged that the defendant became surety for him to the amount of $39.07, and that he conveyed to the defendant, for security and indemnity, his farm worth $700; that he paid the debt for which the defendant was his surety; that the defendant afterwards conveyed the farm to a third person; that he requested the defendant to re-convey the land, and that he wholly refused to convey to the plaintiff, and conveyed the land to a third person. There was also a count for money had and received.

At the trial before EMERY, J., the plaintiff offered to prove, that on April 6, 1830, the plaintiff conveyed his farm to the defendant, worth $700, in consideration that he would pay to Norris a debt of about $40, due from the plaintiff, it being then agreed, that if plaintiff should indemnify the defendant and save him harmless from the debt to Norris, that the defendant should re-convey the farm to the plaintiff; that in July, 1836, the parties met at the house of a magistrate for the purpose of making and executing a re-conveyance of the farm, they then agreeing that the plaintiff had fully repaid and indemnified the defendant for the Norris debt, and the defendant expressed his willingness to execute a deed to the plaintiff, and it being inconvenient at that time for the magistrate to prepare the deed the parties separated; that afterwards, the defendant frequently admitted that he had been fully paid and indemnified for the Norris debt, and agreed to execute a deed of the land to the plaintiff and to fulfil the agreement on his part; that afterwards, October 17, 1836, the defendant conveyed the same farm, by deed of warranty, to one Thomas, who has since, by process at law, recovered seizin and possession thereof against the plaintiff; that in pursuance of the agreement, the magistrate

wrote a deed from the defendant to the plaintiff, from the original deed left for that purpose; and that the defendant came afterwards and took away the old deed, and said that the plaintiff had not behaved well, and he should not execute the new deed. There was no written agreement between the parties. The counsel for the defendant objected to the admission of this evidence or of any part thereof, on account of its not being in writing, and it was for this cause excluded by the judge. A nonsuit was then entered, by consent, which was to be set aside, if the testimony should have been admitted.

J. Williamson for the plaintiff.

W. G. Crosby for the defendant.

The opinion of the court was drawn up by

Weston, C. J. The contract upon which the plaintiff declares is void by the statute of frauds. Where the party who would avail himself of this statute, has himself been guilty of fraud, the party injured may often have a remedy in equity, and sometimes at law. There are cases where a court of equity would decree a specific performance, when the estate had not been previously conveyed to a *bona fide* purchaser, without notice. And when it has, a decree might pass against the fraudulent party, to make compensation in damages.

It has been said, that where a court of chancery would decree a specific performance, upon a parol contract for the sale of land, on the ground of fraud, damages might be recovered at law, based upon such fraud, in a proper action; but not assumpsit upon the contract. Boyd *v.* Stone.[1] It is, however, there stated, that "no instance can be found in the reports of chancery cases of a specific performance decreed, where the fraud consisted only of a breach of promise." The facts offered to be proved present a case of great oppression. Whether any relief could be afforded in chancery, we are not called upon to determine. We are, however, quite clear, upon the authorities, that the plaintiff cannot maintain assumpsit, upon the express contract.

We are further of the opinion, that the plaintiff is entitled to reclaim what he has paid, since the conveyance of the land, upon an assumpsit implied by law. For the liability undertaken by the defendant for the plaintiff, the latter put property into his hands far transcending what was wanted for his indemnity. When the defendant, therefore, paid what he had assumed, retaining the property, and being thereby more than reimbursed, he had no further claim upon the plaintiff. The payment subsequently made by him was to re-purchase the estate upon the parol contract. It was upon this consideration alone that the defendant could equitably receive or retain it. These parol contracts, although not legally, are morally binding, and payments made under them cannot be reclaimed, so long as the party receiving is in no fault. But if he repudiates the contract,

[1] 11 Mass. 342.

a right of reclamation, upon the principles of equity and good conscience, accrues to the other party. Here the defendant has repudiated the contract, by depriving himself of the power of fulfilment. Richards *v.* Allen.[1] Having a second time received of the plaintiff what he had paid for him, he holds the sum last received for the use of the plaintiff; and to that extent, we are satisfied the action may be maintained, if the case stated can be made out in proof.

Nonsuit set aside.

ADDISON D. HAWLEY *v.* ELISHA MOODY.

In the Supreme Court of Vermont, October Term, 1852.

[*Reported in* 24 *Vermont Reports*, 603.]

This was an action of assumpsit. Plea, the general issue, and trial by the court.

On trial, the plaintiff gave evidence tending to prove, that on the 11th day of July, 1851, he contracted with the defendant for a lease of the defendant's tavern-stand in Waterbury, (called the Waterbury House), for one year from and after the first day of September, 1851, for six hundred dollars; and paid the defendant at the time one hundred dollars, in a gold watch, which defendant received as a payment of one hundred dollars towards the rent. And it was further stipulated at the time, that the parties should meet at Mr. Dillingham's office as soon as he returned home (he being absent that day), and execute a written lease. The contract was all in parol. The plaintiff called upon the defendant for the lease, and the defendant soon after, on the same day, tendered the watch back to the plaintiff, which the plaintiff refused to receive, and the watch was afterwards attached by one of the plaintiff's creditors, and sold on execution against the plaintiff.

The defendant, on the 14th day of July, 1851, leased the same premises to one Howard for one year, and declined to lease them to the plaintiff. The plaintiff tendered to the defendant, on the first day of September, 1851, five hundred dollars in specie, and demanded a lease of the premises, according to the contract, which defendant declined.

The county court, March term, in Washington county, 1852, Poland, J., presiding, — adjudged that plaintiff could not recover, and rendered judgment for defendant. Exceptions by plaintiff.

T. P. Redfield for plaintiff.

Peck & Colby and *Dillingham* for defendant.

The opinion of the court was delivered by

Redfield, J. 1. The statute of frauds in this State contains no exception of leases, or contracts for leases *in futuro*, as is found in the English

[1] 17 Maine, 296.

statute and in some of the other States. This case falls, therefore, within the statute.

2. Part-performance has not been regarded as any ground of relief at law; and it has not been considered that part-payment merely amounted to such part-performance as to entitle the party to enforce the contract in equity even, or not generally.

3. The only question then is in regard to the part-payment. It seems to be well settled, that the party repudiating the contract cannot recover for part-payment under it ever, but that the other party may. Shaw *v.* Shaw.[1]

To this extent the counsel seem to understand the law alike, and that would settle the rights of the parties sufficiently, were it not that they seem to stand upon ceremony as to the mode, whether the party making the payment in a specific thing is bound to take back the same thing, when the contract is repudiated by the other party.

There can be no doubt the property passed by the sale and delivery to the defendant, the only question is, as to the effect of defendant's refusal to fulfil the contract. If the contract could be regarded as originally void, like a Sunday contract, then no property would pass, until a reaffirmance on some other day.

But here the contract is not void, as was expressly held by this court in Philbrook *v.* Belknap.[2]

It has always been so held, whenever the question has arisen, notwithstanding the elementary writers, in a loose way, often speak of this class of contracts as void, meaning thereby, contracts upon which no action will lie. That is all the statute provides, "That no suit in law or equity shall be maintained upon them." But to all intents they are contracts, and perfectly valid for all purposes except actions, so long as they are acted under. There can be no doubt the property in this watch passed to defendant, and might have been sold by him, or legally attached upon his debts.

4. The only remaining inquiry then is as to the effect upon the title of the watch, of defendant's refusal to complete the contract. If this were to be regarded like the case where one is induced to purchase property, by fraudulent representations, and where, upon the discovery of such facts, he elects to rescind the contract, as he may, then the property would revest. But here is no fraud in the contract, neither is it the object of the statute to attach to this class of contracts any mark of reproach.

The contract is innocent enough, if each party chooses to trust to the honor of the other party as to its performance. If that were not so, one could not recover for payments made under it. The contract is not void, or affected with any taint or turpitude, nor is it rescindable at the election of either party.

Either party, if he choose, may repudiate it, but that only operates upon

[1] 6 Vt. 69. [2] 6 Vt. 383.

so much of the contract as remains executory at the time, and does not repeal anything done under it. For these purposes it remains in full force. And the party repudiating must be content to lose what he has done under it, as, the contract remaining in force, the other party may defend under it.

But if the party repudiating the future performance has himself received advances which he declines to pay for in the mode stipulated, it is regarded as equitable that he should refund in the usual mode for money had and for goods sold, and it is not in his power without the consent of the other party, to revest the title of the specific things received.

This seems to us the only view consistent with general principles applicable to the subject, or with the decided cases, and manifestly just and equitable. If the party has bought goods which he declines to pay for in the mode stipulated, and which but for his own act he might do, he ought and he must be content to pay in the usual mode of paying for goods sold and delivered, and this recovery may be had under the general counts. Gray *v.* Hill.[1]

As the former cases upon this subject have adopted no principle at all analogous to allowing either party the power of rescission of the contract, we feel reluctant to push ourselves upon an unexplored field, without some obvious and pressing necessity, in order to warp justice, which we think is not this case.

By the adoption of this new feature, even if it were more consonant with justice in the particular case, which we think it clearly is not, we should be fearful of ultimately encountering evils which are not apparent at the moment. And there are some which we could easily foresee might arise. The specific things received in payment might have been more or less put to use by the party receiving them, for which he ought to be accountable.

They might have been sold and transferred in different modes, and thus new rights and interests intervene. And if we adopt the principle of rescission, we do not see, but in principle, it will cut off by the roots all rights accrued under the contract before repudiation, which would certainly be unjust to the innocent party.

And as the repudiating party is always clearly in the wrong, it can be no hardship upon him, to pay in currency for what he has received in advance upon the contract.

If one party has the power of rescission, then the other, and especially the innocent party, should have the power. The result of which must be that, however many times the property has changed hands, or under whatever circumstances, the innocent party may pursue it and recover of the last proprietor, if not of each intervening one, which would often be attended with serious embarrassment and probable wrong.

Judgment reversed and case remanded for new trial.

[1] 1 R. & M. 420; Chitty on Contracts, 305.

JOSEPH S. SMITH *v.* THE ADMINISTRATORS OF JOHN S. SMITH, DECEASED.

IN THE SUPREME COURT OF NEW JERSEY, FEBRUARY TERM, 1860.

[*Reported in* 4 *Dutcher*, 208.]

THIS cause came before the court on the following state of the case, certified from the Warren circuit.

This suit was brought by the plaintiff against the defendants, as administrators of the estate of John S. Smith, deceased, to recover the cost and expenses of erecting a dwelling-house and cow-shed by plaintiff upon a farm of the deceased, situate in the township of Blairstown, in the county of Warren. The declaration, besides several special counts, contained the ordinary common counts.

It appeared on the trial that the said deceased, in his lifetime, was the owner of several farms situate in the county of Warren; that the plaintiff, who was a son of the deceased, had lived on one of the said farms, as a tenant from year to year, for upwards of twenty-three years prior to the death of the said John S. Smith, first farming the same on shares, and afterwards at a low money rent, which he had paid regularly to within a short time of the death of his father; that the other farms of the deceased were also occupied by his other sons at low rents; that during the tenancy of the plaintiff the dwelling-house on the said farm became greatly dilapidated and out of repair. It was testified to by the plaintiff's son and son-in-law, that in the year 1854, the plaintiff applied to the deceased to put up a new dwelling-house and cow-shed on the premises, and that the deceased said that the house was getting old, and a new one was needed; and that a cow-shed was also needed, but that he was getting too old to build, and had no horses and wagon to build with, and told the plaintiff to go on and build a house and cow-shed to suit himself; and that the plaintiff replied that he would not build on an uncertainty, and that the deceased told the plaintiff to go on and build, and the farm should be his: and it was further testified to by Mary Snyder, that the deceased, in a conversation with her, said that the plaintiff wanted him to build a better house, and he thought the plaintiff ought to have a better house, but he was getting old, and had done all the building he would ever do — if the plaintiff wanted a better house he should build it himself; that the plaintiff had replied to that, that he, the plaintiff, did not want to build on an uncertainty, and he did not know who he was working for, and that he, the deceased, had told the plaintiff to go on and fix what he had a mind to — that he had left it to him.

It further appeared in evidence that, during the year 1855, the plaintiff built on the said farm, at his own expense, a dwelling house and cow-shed at a considerable cost, and continued to occupy the farm as a tenant from year to year until the death of his father; that the said John S. Smith died, in December, 1856, intestate, without conveying or devising the said farm to the plaintiff, and that the said farm, with the other lands of the deceased, descended to his six heirs-at-law, of whom the plaintiff was one.

It did not appear in evidence that the said agreement was reduced to writing, or that the said deceased specified the size of the buildings or the materials to be used, but it was shown in evidence that the deceased was occasionally on the premises while the house was being built, and that he expressed himself pleased with the manner in which the plaintiff was putting up the building; and it further appeared that the said house was a suitable one for the farm.

It also appeared in evidence that the said farm, as occupied by plaintiff when the said buildings were erected, contained about one hundred acres of land, and was worth, without the plaintiff's improvements, from $3000 to $3500, and that the estimated cost of the said building was from $600 to $1200.

It further appeared in evidence that, after the death of the said John S. Smith, a dispute arose concerning the granting of letters of administration upon his estate, and that, for the purpose of settling this dispute and dividing the real estate of the deceased among his heirs, the heirs-at-law and widow of deceased entered into the following agreement: —

"Memorandum of an agreement, made this sixteenth day of February, eighteen hundred and fifty-seven, between Rachel Smith, widow of John S. Smith, late of the township of Blairstown, in the county of Warren, and State of New Jersey, deceased, and Joseph Smith, Lewis Smith, Benjamin L. Smith, John Snover, and Mary his wife, formerly Mary Smith, John Smith, of the said county, and Elisha Smith, of McComb county, Michigan, all heirs-at-law of the said John S. Smith, deceased. Whereas disputes have arisen between the said widow and the said heirs-at-law of said deceased in relation to the administration on the estate of said deceased and the assignment of dower to the widow of said deceased, and the division of the real estate of said deceased among the heirs-at-law of said deceased, for the purpose of amicably settling the said disputes between the said widow and heirs, and among the said heirs themselves, the said Rachel Smith, Joseph Smith, Lewis Smith, Benjamin L. Smith, John Snover, and Mary his wife, John Smith, and Elisha Smith, for the consideration of the sum of one dollar to each by the other in hand paid, have mutually agreed to a settlement of the said disputes as follows: —

"*First.* It is mutually agreed that the said Rachel Smith, the widow of the deceased, and William L. Hoagland, of the township of Blairstown,

shall be appointed joint administrators of the estate of the said deceased, giving bond for the due execution of their offices according to law.

"*Second.* It is mutually agreed between the parties that Aaron O. Bartow and John H. Blair, of Knowlton, and John Shannon, of Blairstown, in said county, shall assign and set off to the widow of the said deceased, her dower in the lands of the said deceased, and that any assignment of dower to said widow, made in writing under the hands of the said Aaron O. Bartow, John H. Blair, and John Shannon, or a majority of them, on or before the thirtieth day of April next (1857) shall be binding and conclusive upon the said parties; and that the said widow shall enjoy the said lands so set off or assigned by the said Aaron O. Bartow, John H. Blair, and John Shannon, and hold the same for her dower in the same manner and for the same estate as she would be entitled to do in case the same had been set off by any court having jurisdiction of the same; and the said Rachel Smith shall release and remise all her right and claim to the other lands of the said deceased to the heirs-at-law of the said deceased, as the same may be divided among them, as hereinafter specified.

"*Third.* It is mutually agreed, by and between the said heirs-at-law of the said deceased, that the residue of the said lands of the said deceased which may not be set off and assigned to the widow of the said deceased as aforesaid shall be partitioned off and divided among the said heirs-at-law in equal shares, by the said Aaron O. Bartow, John H. Blair, and John Shannon, and that the award or determination of the said Aaron O. Bartow, John H. Blair, and John Shannon, made under their hands, or the hands of a majority of them, making a partition or division of the said last named lands among the heirs of said deceased, and specifying the part or parcel thereof to be held by each one, shall be binding and conclusive on the said heirs, and that the said heirs shall thereafter each hold in severalty the part or share of the said lands so as aforesaid set off and assigned to him or her, and shall mutually execute, each to the other, such releases and conveyances as may be necessary and proper to vest in each the portion or parcel of said lands so as aforesaid determined and specified to belong to each in fee simple: and it is further mutually agreed, by and between the said heirs, that the said partition or division shall be made on or before the thirtieth day of April next (1857), and that as soon as mutual releases shall be exchanged as aforesaid, each shall be entitled to enter immediately into the possession and enjoyment of the part or parcel so assigned and set off to him or her, reserving, however, to the persons now in the occupation of the said premises the right which they now have in the crops standing or growing on the said premises; provided however, that the share or part assigned and set off as aforesaid to Mary Snover, wife of said John Snover, shall be so assigned and specified, by the said Aaron O. Bartow, John H. Blair, and John Shannon, that the same shall extend and reach to some one of the highways upon which the said lands lie.

"*Fourth.* It is also mutually agreed, by and between the said heirs-at law, that if the said partition or division shall be made among the said heirs at-law as aforesaid, and it shall subsequently be discovered that the personal estate of the said deceased shall not be sufficient to pay debts and expenses, so that it shall be necessary to make application to the court for an order to sell lands, that then and in that case each of the said heirs shall and will pay to the administrators of the said deceased an equal one-sixth part of the deficit, and that the payment of the same by each one shall be and remain a charge upon the share of such one in the said lands; and further, that the expense of the said partition and assignment of dower shall be paid equally by the said heirs.

"*Fifth.* It is further agreed that nothing in this agreement shall bar or release any claim, debt, or demand which either of the said heirs shall have against the said estate of the said deceased; and for the due performance of all and singular the matters and things herein contained, the parties hereto bind themselves each for himself or herself, but not for the other, to the others, their heirs, executors, administrators firmly by these presents."

Which agreement was signed and sealed by all the parties therein named.

It further appeared in evidence that, in pursuance of the above agreement, the said Aaron O. Bartow, John H. Blair, and John Shannon set off the dower of the widow, and made a division of the residue of the lands of deceased among the said heirs, and that in that division they assigned and set off to the plaintiff twenty-seven acres and fifty-eight hundredths from the said farm, and that the buildings, for the recovery of the cost of which this suit was brought, were situate on the part assigned to plaintiff in the said division; and that in that division the commissioners made to the plaintiff no allowance for the buildings, but valued the lands and buildings together as part of the estate of the deceased, and that the plaintiff afterwards sold the portion set off to him for the sum of $2000.

The jury rendered a verdict for defendant by direction of the court. The court granted a rule to show cause why there should not be a new trial.

"I, Edward W. Whelpley, judge of the Circuit Court of the county of Warren, certify the case to the Supreme Court, for its advisory opinion upon the following points: —

"1. Whether there was any evidence in the cause from which the jury could lawfully infer a promise by John S. Smith, deceased, or his administrators, since his death, to pay for the improvements in money or out of the personal estate of said Smith.

"2. Whether the agreement to leave the plaintiff the farm, or give it to him by will or otherwise, was within the statute of frauds.

"3. Whether plaintiff entering into the agreement set out, and receiving

from the part set off to him more than the cost of his improvements, does not prevent the arising of any implied promise by the administrators to pay for the improvements which might have been raised if the intestate had, and the plaintiff lost, the value of his labor and materials.

"4. Whether the vesting of the land on which the buildings were erected in the plaintiff by descent and the division made is not so far a performance of the intestate's contract with the plaintiff as to be a bar to any action for the non-performance of the contract, or to recover back the consideration of it, to wit, the value of the plaintiff's work, labor, and materials put and expended upon the land of which he had the possession."

Argued at November term, 1859, before the CHIEF JUSTICE and Justices HAINES, VREDENBURGH, and VAN DYKE.

Depue and *Shipman* for plaintiffs.

Kennedy and *Sherrard* for defendants.

The opinion of the court was delivered by the

CHIEF JUSTICE. The contract proved upon the trial of this case, or which the evidence tended to prove, was clearly within the statute of frauds and perjuries. It was a contract for the transfer of an interest in land. The plaintiff, who was tenant from year to year of his father (the defendant's intestate), erected new buildings upon the demised premises upon the authority of his father, who told the plaintiff "to go on and build, and the farm should be his," or, as another witness testified, "to go on and fix what he had a mind to — he had left it to him." The evidence in the cause would have warranted the jury in finding that the plaintiff erected the buildings with the consent and approbation of his father, upon his express promise that the farm should be his upon his father's death, by deed or devise. The contract to transfer the land, being within the statute of frauds, was void, and cannot form the foundation of an action. The plaintiff, therefore, clearly could not sue upon the special contract.

May the jury lawfully infer a promise to pay for the improvements in money out of the personal estate of the deceased? It is clear, from the evidence, that the erection of the buildings was not a voluntary service, nor a service rendered relying upon the generosity of the intestate to make compensation. The son expressly refused to proceed with the buildings till he had his father's promise that the farm should be his. The case, therefore, does not fall within the familiar principle, that no promise can be implied to pay for gratuitous services or services rendered in expectation of a legacy. Grandin *v.* Reading;[1] Johnson *v.* Hubbell;[2] Jacobson *v.* Ex'rs of Le Grange;[3] Martin *v.* Wright;[4] Little *v.* Dawson.[5]

But will the law raise an implied promise to pay money when there was an express promise to pay in land? The answer is, that the promise to pay in land was void, and therefore no promise. If the plaintiff had erected

[1] 2 Stock. 370. [2] 2 Stock. 332. [3] 3 Johns. 199.
[4] 13 Wend. 460. [5] 4 Dall. 111.

the buildings upon the intestate's land at his request, the law would have implied a promise to pay for them. The plaintiff is in no worse situation because the defendant made an express promise to pay for the services in a particular mode, which promise is itself a nullity. The true principle, says Mr. Chief Justice NELSON, is this: "The contract being void and incapable of enforcement in a court of law, the party paying the money or rendering the services in pursuance thereof may treat it as a nullity, and recover the money or the value of the services rendered under the common counts. This is the universal rule in cases where the contract is void for any cause not illegal, if the defendant be in default." King *v.* Brown.[1]

The principle seems to be perfectly well settled, and is sustained by very numerous authorities, that where a party to an agreement void by the statute of frauds fails to execute it, the price advanced, or the value of the article delivered in part performance of the contract, whether in money, labor, or chattels, may be recovered back. Mavor *v.* Pyne;[2] Gray *v.* Hill;[3] Gillet *v.* Maynard;[4] Shute *v.* Dorr;[5] Lockwood *v.* Barnes;[6] Abbott *v.* Draper.[7]

In all such cases the law raises by implication a promise to repay advances made upon the faith of the contract, and for which no consideration has been paid. If, as a consideration for the improvement, the intestate had agreed to devise to the plaintiff a different tract of land from that upon which the improvement was made the case would be clear of difficulty. But as the improvement is made upon the farm agreed to be devised, it may be urged that the improvement was made not for the benefit of the intestate, but for the plaintiff's own benefit, inasmuch as he resided upon the farm during his life, and expected to receive it after his death.

It is true that where the vendee in possession under a parol agreement for the purchase of land makes improvements upon the premises, he cannot recover the value of such improvements in an action at law, upon the refusal of the vendor to fulfil the contract. Gillet *v.* Maynard;[8] Shreve *v.* Grimes.[9]

The improvements in such case are not made at the instance or request of the vendor, nor for his benefit, but for the benefit of the party making them. The law, therefore, will imply no promise by the vendor to pay for them. But this case does not fall within that principle. The plaintiff was not in possession under a contract for the land, but as tenant from year to year paying rent. The improvements inured to the benefit of the intestate. He might, upon the completion of the improvements, have turned the plaintiff out of possession, or demanded and received an increased rent for the premises during his life. He was instrumental in having the improvements made. The plaintiff refused to make them until

[1] 2 Hill, 486. [2] 3 Bing. 285. [3] Ry. & M. 420.
[4] 5 Johns. R. 85, and cases cited in note *a*. [5] 5 Wend. 204.
[6] 3 Hill, 128. [7] 4 Den. 51. [8] 5 Johns. 85.
[9] 4 Littell, 224.

he had his father's promise that the land should eventually be his. The improvements were not only made by the procurement of the intestate, and for his use, but his estate has actually received the increased value of the improvements made by the money and the labor of the plaintiff. There seems no good reason, either in law or equity, why the jury may not infer a promise to pay for them. If it be objected that the evidence in the cause admits of a different interpretation, and that the terms of the contract were different from those above stated, the answer is, that what is really proved by the evidence was a question of fact, and should have been submitted to the jury.

3. The legal rights of the plaintiff under the contract were in nowise affected by the agreement entered into among the heirs, after the death of John S. Smith, for the settlement of the intestate's estate. It was expressly stipulated that nothing in the agreement should bar or release any claim which either of the heirs might have against the estate.

4. Neither the vesting of the title to the land upon which the buildings were erected in the plaintiff, as one of the heirs-at-law of the intestate, nor the assignment of a portion of the farm upon which the buildings were erected to the plaintiff under the agreement among the heirs, can be regarded as a performance of the intestate's contract with the plaintiff. The plain sense of the agreement was, that the plaintiff should be paid for his improvements; that their value should be added to his portion of the estate; that he should have the farm and the buildings. The agreement among the heirs contemplates an equal division of the intestate's estate among all the heirs, allowing the plaintiff no compensation whatever for his improvements more than he would have received as an heir-at-law had the improvements been made by him gratuitously and exclusively for his father's benefit. An allowance, it is true, might have been made in the division of the estate by the commissioners, with the assent of the heirs, to the plaintiff for his improvements. But it is not contemplated in the agreement, and whether made or not would be a question of fact for the jury.

The verdict should be set aside; and a new trial granted and the Circuit Court should be advised accordingly.

DANIEL WILLIAMS *v.* JONAS BEMIS, Executor.

In the Supreme Judicial Court of Massachusetts, October Term, 1871.

[*Reported in* 108 *Massachusetts Reports*, 91.]

Contract for work done and materials furnished in cultivating the land of Harvlin Towne, the defendant's testator. Trial in the Superior Court,

before SCUDDER, J., who, before verdict, by consent of the parties, made a report of the case, of which the material parts were as follows : —

"The plaintiff testified that the work was done and the materials used by him upon the land of Towne under Towne's general direction. On cross-examination he testified, against his own objection, that before he began the work Towne said he might take the land for one year and plant it with potatoes, and he would furnish one half the seed and the necessary dressing, and give the plaintiff two thirds of the crop ; that the plaintiff declined to take the land for one year upon the terms named, telling Towne that the labor and seed to be furnished by him would cost more than he could get for it the first year ; but that he told Towne he would take the land and do the work on it for two years for two-thirds of the crop for two years, the plaintiff to furnish one half of the seed and all the labor, and Towne all the manure, and phosphate if necessary, and Towne assented ; that the work named in the declaration was done under the contract during the first year ; that at the expiration of the first year the crop of that year was divided according to the contract, the plaintiff taking two-thirds and Towne one-third thereof ; that Towne then refused to allow the plaintiff to plant the land the second year ; and that the work done and seed furnished and used upon the land by the plaintiff during the first year was more than was necessary for the first year's crop, and of greater value than the plaintiff's share of that crop, and inured to the permanent benefit of the land, and of the crop for the second year, as was understood and anticipated by the parties when the contract was entered into and the work was done and the seed used upon the land."

If upon this testimony the plaintiff was to recover anything beyond the crop already received by him, then judgment was to be entered for the plaintiff for the sum of $53.25, otherwise judgment to be entered for the defendant.

G. F. Hoar and *W. A. Williams* for the plaintiff.

F. P. Goulding for the defendant.

AMES, J. An action for money had and received lies to recover back money paid by a party to an agreement which is invalid by the statute of frauds, and which the other party refuses to perform. Cook *v.* Doggett ;[1] Basford *v.* Pearson ;[2] Gillet *v.* Maynard.[3] An action would also lie for the return of any article delivered, or for payment for labor and services rendered, upon such an agreement and under such circumstances. Sherburne *v.* Fuller ;[4] Lane *v.* Shackford ;[5] Holbrook *v.* Armstrong.[6] Such is undoubtedly the general rule, as established by numerous authorities. "Certainly so much as has been expended by the plaintiff in money or labor may be recovered in an action for money paid, or for work and labor done, for the

[1] 2 Allen, 439. [2] 9 Allen, 387. [3] 5 Johns. 85.
[4] 5 Mass. 133. [5] 5 N. H. 130. [6] 1 Fairf. 31.

defendant." Kidder *v.* Hunt;[1] Shute *v.* Dorr.[2] "The true principle is this: the contract being void and incapable of enforcement in a court of law" (the defendant having refused to perform it), "the party paying the money, or rendering the services in pursuance thereof, may treat it as a nullity, and recover the money or value of the services under the common counts." King *v.* Brown,[3] per NELSON, C. J. In Gray *v.* Hill,[4] BEST, C. J., held that where the defendant, in consideration of certain repairs to be made by the plaintiff, agreed to assign a lease to him, and after the repairs were made refused to make the assignment, and set up the statute of frauds as a defence, the law implied a promise to pay for the repairs, and this implied promise was "not touched by the statute." See also Van Deusen *v.* Blum.[5]

The defendant insists that the work was done by the plaintiff in the cultivation of crops which were to be partly his own, and was not done upon the credit of Towne, or with any expectation of charging it against him. Such undoubtedly was the understanding of the parties originally. But as Towne saw fit to say that the special contract was not binding upon him, it cannot be set up by his executor as binding upon the plaintiff. King *v.* Welcome.[6] It cannot be treated as a nullity for one purpose, and as a contract for another. It required two years for its completion, and both parties understood that there was to be no profit or advantage to the plaintiff except from the operations of both years taken together. A large part of the labor and expense incurred in the first year, had no reference whatever to the operations and results of that year, taken by itself, but were a preparation of the land for increased productiveness in the second year. The plaintiff must be considered as having, in that way, paid in advance, in part at least, for the privilege of using the land the second year in the manner agreed upon. By the repudiation of the contract, he has lost the privilege which he had so paid for. The consideration upon which he made that payment has failed by the wilful act of the other party to the contract, and he is therefore entitled to recover back what he has so paid. Basford *v.* Pearson.[7] If it had been a payment in money, it would be too plain to be controverted. A payment in labor and services, of which the other has secured the benefit, stands upon the same ground.

Judgment for the plaintiff for the sum agreed.

[1] 1 Pick. 328, 331.
[2] 5 Wend. 204.
[3] 2 Hill, 485, 487.
[4] Ry. & M. 420.
[5] 18 Pick. 229.
[6] 5 Gray, 41.
[7] 9 Allen, 387.

OLIVER H. DAY, RESPONDENT, *v.* THE NEW YORK CENTRAL RAILROAD COMPANY, APPELLANT.

IN THE COMMISSION OF APPEALS OF NEW YORK, MARCH TERM, 1873.

[*Reported in* 51 *New York Reports*, 583.]

APPEAL from judgment of the General Term of the Supreme Court in the eighth judicial district, affirming a judgment in favor of the plaintiff, entered upon a verdict.

The complaint contained two causes of action; and for the first cause alleged in substance that in May, 1855, the plaintiff agreed to convey to the defendant about an acre and two-thirds of an acre of land, together with the right of ingress and egress, to and from the land so to be conveyed, to the plaintiff's land, and to build and keep in repair cattle yards and pens for live stock, sufficient to accommodate the shipping or transporting such stock to and from the cars to the plaintiff's land, adjoining the land so to be conveyed, free from any expense to the defendant; and that the defendant should temporarily deliver to the plaintiff, from that time forward, for temporarily keeping and feeding, all the cattle, swine and live stock which should be transported on its road eastward from the Niagara River, the profits of such keeping and feeding to be realized by the plaintiff; that the defendant, for that purpose, requested the plaintiff to build, make, and construct the necessary yards, pens, and so forth, for the temporary feeding and keeping such live stock; that a conveyance of the land was made by the plaintiff to the defendant, and the necessary yards, pens, and other conveniences for doing business, contemplated by the agreement, were constructed by the plaintiff; that the defendant disregarded the agreement entered into on its part, and refused to allow the live stock transported on its road to be delivered temporarily to the plaintiff for feeding and keeping, and refused to allow the plaintiff the enjoyment of the profits he would have realized by keeping and feeding such stock.

The second cause of action was an *indebitatus assumpsit* for land sold and conveyed, for a right of way for use and occupation of land and premises, for work and labor, care and diligence, and for materials furnished, and for construction of cattle yards, etc., for the defendant.

The answer was a general denial.

The first cause of action only was contained in the original complaint, and the action was tried on that issue in November, 1858, and a verdict rendered for the plaintiff for $4384. On appeal to the General Term, a new trial was ordered, on the ground that the agreement on the part of

the appellant, being verbal only, was void by the statute of frauds, for the reason that it was not to be performed within one year, and also that it created a negative easement on the lands of the plaintiff.[1]

The plaintiff then amended his complaint, adding thereto the second count, and a second trial was afterward had, and a verdict recovered by the plaintiff in 1867 for $2500. On a second appeal to the General Term, a new trial was ordered on the ground that the damages should have been confined to the value of the land conveyed by the plaintiff.[2]

On the third and last trial, damages were recovered only for the actual value of the land conveyed by plaintiff to the defendant, with the interest.

On the last trial, the plaintiff gave evidence tending to prove the parol agreement alleged in the first count of the complaint, and that the plaintiff and his wife, on the 9th day of July, 1855, executed and delivered to the defendant a deed of the land, which also contained a grant on their part to the defendant of the right of ingress and egress to and from the land thereby conveyed over and across the land of the plaintiff, to the public highway northwardly, in such place or places as might be convenient or necessary to load or unload cattle, horses, sheep, swine, or any other animal from said highway on to or off of the cars on to the railroad track of the defendant built on the land thereby conveyed; and the deed also contained a covenant on the part of the plaintiff to build and keep in repair all the cattle yards and pens for stock, swine, sheep, etc., that might be wanted to accommodate shipping or transferring to or from the cars on his land adjoining the land thereby sold and conveyed, free from any expense to the defendant.

The plaintiff also proved that he made the erections contemplated by this deed in the summer of 1855, and that the defendant laid down a track on the land conveyed, and that the live stock going eastward was brought in the cars and unloaded into his yards; that the business proceeded thus till the spring of 1856, when the defendant built yards and pens on its own land, and that thereafter some of the stock was unloaded at the plaintiff's and some at the defendant's yards.

The plaintiff testified that the only consideration he got for his deed was one dollar and the parol agreement set forth in the first count of the complaint on the part of defendant, and that he realized in the years 1855 and 1856 profits from the stock brought by the defendant to his yards upward of $6000. The action was commenced November 30, 1857.

The defendant moved that the plaintiff be nonsuited upon the following grounds: That the agreement set forth in the first cause of action being by parol, was void; that the agreement was for a monopoly of the business, and the court should not enforce it; that the plaintiff could not recover on the second cause of action for the improvements made on his own premises; that the plaintiff cannot recover for the value of the agreement to give the

[1] 31 Barb. 548. [2] 53 Barb. 250.

plaintiff the business of yarding and feeding hogs and cattle, for this would be another mode of recovering damages for the breach of the alleged agreement. Also upon other grounds which are included substantially in the requests to charge, hereinafter stated. The court denied the motion, and the defendant excepted.

The defendant's counsel requested the court to charge the jury that the plaintiff could not recover the value of the land conveyed, (1) because the defendant never agreed to purchase it or to pay any consideration for its conveyance; (2) because he must first rescind the agreement and restore what he has had under it, to wit, the enjoyment of the stock business for two years, and the consequent profits thereof; (3) because there must be a total failure of consideration for the conveyance to enable the plaintiff to recover; (4) because he cannot rescind the contract in part and affirm it in part; (5) because to recover under the common counts the plaintiff must first restore what he has acquired of the defendant. The court refused so to instruct the jury, and the defendant's counsel excepted.

The defendant's counsel also requested the court to instruct the jury that if both parties had performed the agreement in part the plaintiff could not maintain the second cause of action, in case the jury found he had received any benefit from defendant's partial performance; also, that the plaintiff could not recover unless the jury found that he had not received any consideration for the conveyance of the land; that proof of a partial failure of consideration would not support such a cause of action; also, that the consideration of one dollar, expressed in the deed, and the express covenant to do the things specified "free of any expense to the railroad company," deprived the plaintiff of the right to maintain the cause of action secondly set forth; also, that if they found that the plaintiff was entitled to recover, he could recover only such sum as, together with the benefit he had received by the partial performance on the part of the defendant, would remunerate him for the value of the land he conveyed; that the amount of the profits made by the plaintiff out of the business during the time the defendant performed the agreement on its part must be deducted from the value of the land conveyed; also, that if the profits realized by the plaintiff from the business furnished by the defendant at his yards, exceeded or equalled his expenditures for improvements and the value of the land conveyed, he could not recover; also that, in determining the amount of the damages, the jury had the right to take into consideration the benefits the plaintiff had derived from the partial performance by the defendant of the contract.

The court refused each request, and defendant excepted.

The court charged the jury, in substance, that the plaintiff could not recover upon the first cause of action, for the reason that the agreement therein set forth was void under the statute of frauds, but that he could recover on the cause of action secondly set forth, if the jury found the facts

in respect to the contract to be as the plaintiff claims, provided they also found that the plaintiff had complied with and performed the contract on his part and the defendant had broken and refused to perform the same, and if they so found, then the damages to which the plaintiff would be entitled would consist of the value of the land granted to the defendant by the plaintiff, including the right of way granted by the deed, as actually appropriated and used by defendant, and interest on such value.

That the plaintiff could not recover any damages in this action, unless it was proven to their satisfaction that the agreement on the part of the defendant, was made as the consideration of the deed from the plaintiff to the defendant. The defendant excepted to the charge that the plaintiff could recover for the value of the land, or for the value of the right of way. The jury rendered a verdict for $828.58.

John Ganson for the appellant.

A. R. Potter for the respondent.

Earl, C. The point was not taken by the defendant at any stage of the trial, that the plaintiff had not given sufficient proof tending to establish the parol agreement claimed by him, to wit: That in consideration of the conveyance of the land to the defendant, it was to give to the plaintiff at his yards and pens the business of temporarily keeping and feeding all the stock which should be transported upon its road eastward from Niagara River. Hence we must assume, for the purposes of the appeal, that the parol agreement, as testified to by the plaintiff, was established. We must also assume that this agreement was void under the statute of frauds, for such is the claim on the part of the defendant, and it was upon this theory alone that the recovery was based, and upon it alone the plaintiff seeks to uphold the judgment. As the consideration for the plaintiff's land, the defendant agreed to pay him one dollar and to give him the stock business at his yards. It paid him the one dollar and gave him all the business for the year 1855 and part of it for the year 1856, and out of this business the plaintiff made profits to the amount of about $6000. And yet he brings this action to recover the entire value of the land conveyed by him on the ground of a total failure of the consideration of his conveyance. A mere statement of the case shows that the action must be without foundation.

If one pays money, or renders service, or delivers property upon an agreement condemned by the statute of frauds, he may recover the money paid, in an action for money had and received, and he may recover the value of his services and of his property upon an implied assumpsit to pay, provided he can show that he has been ready and willing to perform the agreement, and the other party has repudiated or refused to perform it. Gillet *v.* Maynard;[1] King *v.* Brown;[2] Cook *v.* Doggett;[3] Erben *v.* Lorillard;[4] Richards *v.* Allen.[5]

[1] 5 Johns. 85. [2] 2 Hill, 439. [3] 2 Allen, 439.
[4] 19 N. Y. 299. [5] 17 Me. 296.

While the law in such case will not sustain an action based upon the agreement, it still recognizes its existence and treats it as morally binding, and for that reason will not give relief against a party not in default, nor in favor of a party who is in default in his performance of the agreement.

A party who has received anything under such an agreement, and then has refused to perform it, ought in justice to pay for what he has received, and hence the law for the purpose of doing justice to the other party will imply an assumpsit.

An assumpsit is never implied except where the justice and equity of the case demand it. A party entering into an agreement, invalid under the statute of frauds, is charged with knowledge that he cannot enforce his agreement, and if he, not being in default, has received part of the consideration of his agreement, upon what principle of justice or equity will the law imply an assumpsit on the part of the party in default still to pay the entire consideration? Yet such an assumpsit has been enforced in this case.

Suppose one agree by parol to work for another for ten years for the consideration of $500, to be paid at the end of that time, and also a piece of land to be conveyed to him, and at the end of the time the $500 be paid and the conveyance of the land refused, can he, upon an implied assumpsit, recover the entire value of his services? If he has received no part of the consideration agreed to be paid to him, the law will imply a promise to pay him what his services are worth, and will enforce such promise. But what shall be done when he has received part of the consideration? He should not be left without any remedy for the balance honestly due him, but upon the same principles of justice and equity the law should imply a promise to pay the balance.

Here the plaintiff was to receive for his land one dollar and the stock business at his yards. The one dollar may be regarded as merely nominal, and the other must be held to be the substantial consideration. The plaintiff expected to get the value of his land in the profits which he should make out of the business which the defendant should give him. This business the defendant gave to the plaintiff for one year, at least, just as it agreed to, and out of it the plaintiff appears to have made profits much greater than the value of the land conveyed. These profits were the very consideration contemplated by the parties for the conveyance of the land, and to the extent that the plaintiff has had the business and profits, he has had the very consideration he contracted for. Suppose the defendant had agreed to pay plaintiff $100 and also to give him the stock business, could the plaintiff in this action after receiving the $100 recover the whole value of the land, entirely ignoring the money payment? Suppose, instead of giving the defendant land, the plaintiff had paid it money for the same consideration, could he, under the circumstances of this case, recover back all the money paid in an action for money had and received? Clearly not.

The very basis upon which the action rests forbids it. As said by Lord MANSFIELD, in Moses *v.* Macferlan,[1] "if the defendant be under an obligation from the ties of natural justice to refund, the law implies a debt, and gives this action founded in the equity of the plaintiff's case." And he says the action "is equally beneficial to the defendant. It is the most favorable way in which he can be sued; he can be liable no further than the money he has received; and against that may go into every equitable defence upon the general issue; he may claim every equitable allowance; he may prove a release without pleading it; in short, he may defend himself by everything which shows that the plaintiff, *ex æquo et bono*, is not entitled to the whole of his demand or to any part of it." And in Longchamp *v.* Kinny,[2] the same learned judge says: "Great benefit arises from a liberal extension of the action for money had and received, because the charge and defence in this kind of action are both governed by the true equity and conscience of the case." It would be against both equity and good conscience to allow the plaintiff in the case supposed to recover all the consideration which he had paid, when he had already received a part of the benefit and consideration which he had contracted for. Within the principles laid down in the cases cited he would be permitted to recover the balance only of the money paid by him after deducting the value of so much of the consideration as he had received, and if it could be shown in such case by the defendant that plaintiff had actually received from the defendant upon the agreement more than he had paid, there would be no basis of law or equity for the action to stand on. The same principles of justice and equity should be applied to this case. The plaintiff's equities can be no greater that he paid in land rather than in money. The agreement cannot be enforced. Neither party can in this action be allowed any benefit from it or any damage for its breach. The defendant having repudiated the agreement, the plaintiff can recover for his land as if there had been no agreement as to the amount of the consideration, but he must allow so much of the consideration as has been paid; and if he has received more in the profits of the business which the defendant brought to him under the agreement than the value of his land, he can recover nothing. If the profits are less than the value of the land, then he can recover the balance.

It was not necessary for the plaintiff to tender the profits to the defendant before the commencement of the action. They were part of the consideration received by him for his conveyance, and he has the same right to hold them as if so much money had been paid to him by the defendant. His claim is against the defendant for the balance, if any, of the value of the land. These views are fully supported by well-recognized principles of law. I find no authority in conflict with them, and the case of Richards *v.* Allen,[3] is the only authority which has come to my notice directly in point.

[1] 2 Burr. 1005. [2] 1 Dougl. 137. [3] 17 Maine, 296.

In that case there was a verbal contract between the plaintiff and defendant for the purchase and sale of a farm, and the plaintiff had delivered to the defendant upon the contract a quantity of brick and a yoke of oxen. After the plaintiff had been in possession of the farm for about twenty years the defendant conveyed it to another person and refused to convey to the plaintiff. He then sued the defendant in assumpsit for the value of the brick and oxen, and it was held that he could recover, but that he must allow for the use of the land. The court says: "But the plaintiff's claim must be limited to what is just and equitable under all the circumstances. He had made some payments, but he had enjoyed the farm for eighteen or twenty years. The jury should have been permitted to take this into consideration even without an account in offset, as it was necessarily connected with the plaintiff's claim, and was of a character to affect and qualify it."

My conclusion, therefore, is that the judgment should be reversed and new trial granted, costs to abide event.

All concur except JOHNSON, C., not sitting.

Judgment reversed.

E. STILLMAN DIX *v.* THOMAS E. MARCY.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, JANUARY 30, 1875.

[*Reported in* 116 *Massachusetts Reports*, 416.]

CONTRACT to recover $1800, the price of certain real estate conveyed by the plaintiff to the defendant. The answer admitted the conveyance, but averred that it was made voluntarily and without any agreement for payment on the defendant's part. Trial in the Superior Court before DEWEY, J., who, after verdict for the plaintiff, reported the case to this court. The facts appear in the opinion.

S. T. Field for the defendant.

C. G. Delano for the plaintiff.

ENDICOTT, J. The plaintiff conveyed his farm in August, 1872, to the defendant, his son-in-law, upon an oral agreement, that the defendant would furnish him, his wife and daughter, with a comfortable support during their lives. The defendant also agreed to give the plaintiff a mortgage on the farm or a life lease thereof to secure the support. Under this agreement the plaintiff with his wife and daughter lived with the defendant on the farm until January, 1874. A difficulty then occurred. The defendant ordered the plaintiff to leave, and refused to give him a mortgage according to the agreement. Since then the defendant has furnished no support to the plaintiff, though his wife and daughter have remained with the defendant.

The defendant denied that he made such an agreement. But the jury found that in consideration of the conveyance he agreed to give the plaintiff a mortgage or life lease to secure the support of himself and family.

By ordering the plaintiff to leave the farm and refusing to give the mortgage, the defendant rescinded his oral agreement. This agreement, being within the prohibition of the statute of frauds, the plaintiff could not enforce it, but brings this action to recover the value of the property conveyed. It is well settled that he may do so. Where a person pays money, renders service, or conveys property under an agreement, within the statute of frauds, and which the other party refuses to perform, an action will lie by such person against the party so refusing, to recover the money paid, or the value of the services rendered or property conveyed. Sherburne *v.* Fuller ;[1] Kidder *v.* Hunt ;[2] Cook *v.* Doggett ;[3] Basford *v.* Pearson ;[4] Williams *v.* Bemis ;[5] White *v.* Wieland ;[6] Gillet *v.* Maynard ;[7] King *v.* Brown ;[8] Day *v.* New York Central Railroad ;[9] Richards *v.* Allen.[10]

A person who has received a benefit under such an agreement, and then repudiates it, is held to pay for that which he has received ; and there is an implied assumpsit on which the action against him can be maintained. In such an action the plaintiff is entitled to recover what is due him, or the balance that is due him arising out of the transaction between the parties. If the suit is to recover the value of land conveyed, and there has been part performance by the party refusing to complete it, that is to be considered in determining what is due. If payments have been made, they must be deducted from the amount to be recovered for the value of the land. And if the land was not to be paid for by money, but by furnishing support and maintenance, and there has been a partial performance in that respect, the value of such partial performance to the plaintiff must be allowed by him. He is only entitled to receive from the defendant the value of the property conveyed to him.

In this case the value of the support furnished to the plaintiff by the defendant under the oral agreement, and before its rescission, was properly deducted from the value of the farm, and the plaintiff was entitled to recover the value so found. Day *v.* New York Central Railroad ;[11] Richards *v.* Allen ;[12] Moses *v.* Macferlan.[13]

Judgment on the verdict.

[1] 5 Mass. 133, 138. [2] 1 Pick. 328. [3] 2 Allen, 439.
[4] 9 Allen, 387 [5] 108 Mass. 91. [6] 109 Mass. 291.
[7] 5 Johns. 85. [8] 2 Hill, 485. [9] 51 N. Y. 583.
[10] 17 Me. 296. Chit. Con (11th Am. Ed.) 422, *n.*, and cases cited.
[11] 51 N. Y. 583. [12] 17 Me. 296. [13] 2 Burr. 1005.

HARRIET B. PARKER AND ANOTHER *v.* ELIJAH F. TAINTER.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, SEPTEMBER 8, 1877.

[*Reported in* 123 *Massachusetts Reports*, 185.]

CONTRACT. At the trial in the Superior Court, before BRIGHAM, C. J., the plaintiffs proved the following agreement, signed by the defendant: —

"Newton, Mass., November 21st, 1873. Whereas I have agreed with Harriet B. and Sarah E. Parker to lease them a piece of land between Union Hall Building and Alfred Howe's new building on Centre Street, Newton, and whereas there have been some objections to putting up a building on said land, and in order that the said Parker sisters may be protected in putting up the building, and be saved from any loss in the matter, I do hereby agree to protect them in the matter, or to pay all costs of the building and take it off their hands should anything arise whereby I cannot give them a lease for the purpose of erecting the said building as per agreement."

It appeared in evidence that the defendant was in possession of the land mentioned in the agreement and of adjoining premises, and had been in such possession since April, 1872, and claimed under a lease thereof for a term of ten years from that date; that soon after the date of the agreement, the plaintiffs completed the erection of a building on the land, and were in the peaceable and undisturbed occupation of the land and building from December 1, 1873, until some time in May, 1874; and that in April, 1874, the plaintiffs paid to the defendant $50 for the use of the land for four months, from December 1, 1873, to April 1, 1874, at the rent of $12.50 for each month.

It was also in evidence that a large building adjoining the land, and portions of which were held by the defendant under his lease, was, on January 14, 1874, destroyed by fire; that the owners of all the land, including that on which the plaintiffs' building stood, and also the land under the large building, contended that by the destruction of this building the rights of both the plaintiffs and the defendant had been determined, and, on February 4, 1874, notified both the plaintiffs and the defendant in writing to remove therefrom, and also notified the plaintiffs to remove their building, but nothing was done as to the plaintiffs until some time in May, 1874, when the owners took down and removed the plaintiffs' building.

The defendant never made any written lease of the land to the plaintiffs, and there was no agreement in writing between the parties, other than that above set forth; but the judge, against the objection of the defendant, allowed the plaintiffs to testify that the defendant had, prior to the making

of the written agreement, orally agreed to lease to them the land mentioned in the agreement, for the term of eight years.

The defendant contended that the agreement was not sufficient to support this action; that the facts did not show any breach thereof; and also relied upon the statute of frauds.

The judge ruled that the statute of frauds was not applicable, and that, as the foregoing facts were not in dispute, the jury would be warranted in returning a verdict for the plaintiffs for the cost of their building, with interest from the date of the writ. The jury returned a verdict for the plaintiffs; and the judge reported the case for the determination of this court.

If the admission of the oral evidence and the rulings of the judge were correct, judgment was to be entered on the verdict; if, in the absence of such oral agreement, the plaintiffs were entitled to hold the verdict, judgment was to be entered thereon; but, if they were entitled to recover only nominal damages, they were to have judgment accordingly; otherwise, judgment was to be entered for the defendant.

C. Robinson, Jr., for the defendant.

B. E. Perry, for the plaintiffs.

GRAY, C. J. The plaintiffs properly admit that the writing signed by the defendant, reciting that he had agreed to lease the land to them, is not a sufficient memorandum of an agreement for a lease, to satisfy the statute of frauds, because it does not state the term or duration of the lease, and that defect cannot be supplied by parol evidence. Riley *v.* Farnsworth.[1] And we need not consider whether the alternative agreement of the defendant to pay to the plaintiffs the cost of the building, if he should be prevented from giving them a lease, could be considered as an independent promise of itself sufficient to support an action.

The defendant had an estate, though not an absolute title in fee, in the land If the plaintiffs, in consideration of an agreement which was within the statute of frauds, and which the defendant declined to carry out, expended money in building upon his land, they might maintain an action to recover the cost of such building. Kidder *v.* Hunt;[2] White *v.* Wieland;[3] Dix *v.* Marcy.[4] The evidence (laying aside the parol evidence objected to) would support such an action, the declaration was not objected to in point of form, the report shows that it was intended to present the case for decision upon its merits, and the verdict must, under the instructions given to the jury, have been for the cost of the building. By the terms of the report the plaintiffs are therefore entitled to

Judgment on the verdict.

[1] 116 Mass. 223. [2] 1 Pick. 328. [3] 109 Mass. 291. [4] 116 Mass. 416.

WILLIAM P. DOWLING *v.* CATHARINE McKENNEY.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, JUNE 28, 1878.

[*Reported in* 124 *Massachusetts Reports*, 478.]

CONTRACT. The declaration contained three counts. The first was to recover $200, on an account annexed, for "furnishing materials for, and labor and work in making, a monument." The second was as follows: "And the plaintiff says that he made an agreement with the defendant to furnish materials and construct for her a monument for the sum of two hundred dollars; that he furnished materials and made said monument for the defendant, and tendered the same to the defendant; and that she owes him therefor the sum of two hundred dollars." The third was on an account annexed, and contained the following items: "To ten days' labor on monument, $50. To three days' services in preparing land and foundation for same, $15." Answer, a general denial.

At the trial in the Superior Court, before DEWEY, J., the plaintiff testified that he was a manufacturer of monuments and grave-stones, keeping on hand stock and partly finished monuments, to be finished to order; that the defendant came to his shop and said she would like to get a monument; that he showed her several monuments partially manufactured, among them the one in question, the price of which he told her was $250, when finished with base, cap, and plinth, and polished; that she said she had some land, and he said perhaps they might trade with the piece of land; that if he could get a piece of land at a reasonable price he might trade with her; that if she would sell the land at the same price for which she had sold another piece, he would trade with her for the monument; that they went on the land and looked at the lots, for one of which she asked $435; that he told her he would throw off $50 on the monument, calling it $200 complete, if she would throw $35 off on the lot, and would give her $100 in cash, and $100 later, and the monument completed with the inscription, for the lot of land; and that to this proposition she agreed, and the lot was selected and agreed on.

There was also evidence that subsequently the plaintiff purchased a plinth, and one of his workmen worked three or four days, fitting and polishing the monument, putting on the cap and mouldings, and one-third of the inscription, which the defendant had given him to be put on the monument, at the time of the original contract, was put on, taking three days' work; that the defendant then notified the plaintiff that she would not take the monument, as she had been advised it was too large, and refused thereafter to take it; that subsequently the plaintiff completed the

monument and inscription, and offered to deliver it to her, and pay her $100 cash and give her his note for $100, secured by mortgage on the land, and demanded a deed of the land; that she refused to accept the monument, money, and note, and refused to deliver him a deed of the land.

Upon this evidence, the plaintiff contended that he had the right to recover the sum of $200 for furnishing materials and completing the monument, and that, if he could not recover for the materials or the monument, he had a right to recover for his labor in completing the monument. The defendant contended that the Gen. Sts. c. 105, § 1, cl. 4, and § 5, were a bar to the action. The judge, by consent of parties, before verdict, reported the case for the determination of this court. If, on this evidence, the action could not be maintained, judgment was to be entered for the defendant; otherwise, the case to stand for trial.

J. C. Sanborn for the plaintiff.

W. L. Thompson for the defendant.

ENDICOTT, J. It appears from the report that the defendant orally agreed to convey to the plaintiff a lot of land valued at $400, and to take, in exchange or payment therefor, a monument, estimated to be of the value of $200, when completed, and the balance in money. After the monument was finished, the plaintiff tendered it to the defendant, together with the balance in money, according to the contract. The defendant refused to accept the monument or money, or to give the deed.

Whether this was a sale or an exchange of property is immaterial. Assuming that it was an exchange of the land for the monument, with a balance in money to be paid by the plaintiff, it is to be governed by the same rules as apply to a sale when the whole consideration is to be paid in money. Anon.;[1] Commonwealth *v.* Clark;[2] Howard *v.* Harris.[3] The contract was therefore within the prohibition of the statute of frauds.[4] The oral promise on the part of the defendant was not to pay money for the monument, but to convey a lot of land. If the promise had been to pay in money for the monument, when completed, it might have come within the rule, that an agreement to construct or build an article to be paid for when finished need not be proved by a memorandum in writing, as in Mixer *v.* Howarth.[5] But that view of the case cannot be sustained on the evidence as reported; it does not appear to have been the intention of the parties to make any contract, except that which included the conveyance of the land, which was the sole consideration moving from the defendant. That contract was not in writing, and cannot be enforced, in whole or in part. The plaintiff cannot separate that portion which relates to the building of the monument from the whole, and recover upon it as a distinct undertaking. This would be to make a new contract between the parties; for it was no part of the agreement, as stated, to pay $200 in

[1] 3 Salk. 157. [2] 14 Gray, 367, 372. [3] 8 Allen, 297.
[4] Gen. Sts. c. 105, § 1, cl. 4. [5] 21 Pick. 205.

money for the monument, but to allow that sum as a portion of the consideration for the conveyance of the land. The plaintiff therefore cannot recover, either upon his first or second count, for the value of the monument.

But the plaintiff contends that he may, under his third count, recover for his labor in completing the monument. It is true, that when a person pays money, or renders service, or makes a conveyance, under an agreement within the prohibition of the statute of frauds, and the other party refuses to perform it, an action will lie to recover the money so paid, or the value of the services rendered or the property conveyed; but it is on the ground that a party who has received a benefit, under an agreement which he has repudiated, shall be held to pay, upon an implied assumpsit, for that which he has received. Dix *v.* Marcy,[1] and cases cited. In the case at bar, the defendant received no benefit from the labor performed in completing the monument, although the plaintiff may have suffered a loss because he is unable to enforce his contract, and no recovery can be had for the labor on the monument, as charged in the account annexed to the third count.

But this rule does not apply to the item for services performed by the plaintiff in preparing the land and foundation. If this refers to the lot of the defendant where the monument was to stand, and the work was done upon it, we cannot say as matter of law that it was not of benefit to the defendant. That is a question of fact to be determined, and by the terms of the report the entry must be

Case to stand for trial.

(*b.*) *Performance impossible.*

DE SILVALE *v.* KENDALL.

In the King's Bench, April 18, 1815.

[*Reported in* 4 *Maule & Selwyn*, 37.]

Assumpsit for money had and received, and the money counts. Plea, *non assumpsit*. At the trial before Bayley, J., at the last Lancashire summer assizes, there was a verdict for the plaintiff for 192*l.* 9*s.* 10*d.*, subject to the opinion of the court upon the following case.

By charter-party of affreightment, 2d of November, 1812, between the defendant as master of the ship Shannon, then lying in the port of Liverpool, of the one part; and the plaintiff, as merchant, of the other part; the defendant let, and the plaintiff took the said ship to freight, on a voyage from Liverpool to Maranham, in South America, and from thence back

[1] 116 Mass. 416.

to Liverpool, upon certain terms and conditions, and upon covenants on the part of the defendant for receiving and delivering an outward and homeward cargo, and for the performance of the voyage; and there was, amongst others, a covenant that the ship should, at the commencement and during the continuance of the voyage, at the expense of her owners, be kept tight, staunch, and strong, and well and sufficiently fitted out, victualled, and manned; in consideration whereof the plaintiff covenanted with the defendant to dispatch the vessel, to load on board of her at Maranham a cargo of cotton, and to discharge the same in Liverpool, and also that he should and would "pay or cause to be paid unto the defendant for the freight and hire of the vessel on the said voyage from Liverpool to Maranham 120*l.* British sterling; and from Maranham to Liverpool at and after the rate of 2½*d.* British sterling per pound weight for each and every pound of cotton which should be delivered at the King's Beam in Liverpool; such freight to be paid as follows, viz., 120*l.* British sterling for freight of the outward cargo to Maranham, and as much cash as may be found necessary for the vessel's disbursements in Maranham, to be advanced by the plaintiff, his agents or assigns, to the defendant, when required, free from interest and commission, at the current exchange of the place, and the residue of such freight to be paid on the delivery of the cargo in Liverpool, in good and approved bills on London not exceeding three months' date." The vessel sailed from Liverpool, and arrived at Maranham with her outward cargo, and delivered it there; when 120*l.*, the sum stipulated by the charter-party to be paid for the freight of the outward cargo, were paid to the defendant by the agents of the plaintiff. The plaintiff's agents also, on his behalf, paid or advanced to the defendant at Maranham, 192*l.* 9*s.* 10*d.* for the necessary disbursements of the vessel at Maranham, as stipulated by the charter-party to be there paid or advanced. The vessel received at Maranham from the agents of the plaintiff a homeward cargo, and sailed with it for Liverpool; but during the voyage was captured, and, together with her cargo, was wholly lost to the proprietors, and never arrived at Liverpool.

The question is, whether the plaintiff is entitled to recover the 192*l.* 9*s.* 10*d.* so paid or advanced to the defendant at Maranham. If he is, the verdict to stand; if not, a nonsuit to be entered.

Richardson for the plaintiff.

Littledale for the defendant.

Lord ELLENBOROUGH, C. J. By the policy of the law of England freight and wages, strictly so called, do not become due until the voyage has been performed. But it is competent to the parties to a charter-party to covenant by express stipulations in such manner as to control the general operation of law. The question in this case is whether the parties have not so covenanted by the stipulations of this charter-party. If the charter-party be silent the law will demand a performance of the voyage, for no freight

can be due until the voyage be completed. But if the parties have chosen to stipulate by express words, or by words not express but sufficiently intelligible to that end, that a part of the freight (using the word freight) should be paid by anticipation, which should not depend upon the performance of the voyage, may they not so stipulate? Now by this charter party it is stipulated that 120*l.* shall be paid to the defendant for freight of the outward cargo to Maranham, and as much cash as may be found necessary for the ship's disbursements in Maranham, to be advanced by the plaintiff, his agents or assigns, when required, free from interest and commission, at the current exchange of the place, and the residue of such freight (impliedly therefore denominating the former payment as an advance of freight, without interest or commission) upon the delivery of the cargo at Liverpool. It is argued on one side as if this was a mere loan to provide for the necessary disbursements of the ship at Maranham, the money to be advanced indeed at Maranham, and to be afterwards repaid by deducting it from the freight, if freight should be earned, but to be repaid at all events whether freight should be earned or not. And I certainly agree that if the charter-party does not import that this was to be a payment in advance, specifically, of freight, the result would be as contended for. But in the first place the advance is to be made free of interest and commission, which shows it not to have been intended as a loan; for if a loan, why should not interest and commission be paid for it? In the next place the word residue imports that it is freight that was to be partially advanced, of which the remainder only was to abide the usual risk which the law casts upon the earning of freight, that is, the conveyance of the cargo to its place of destination. The preceding payment was on the contrary, by the stipulation of the parties not to be subject to that risk, which but for the stipulation and by the ordinary course of law it would have been. And there can be no doubt that the payment of freight may by the agreement of the parties be so exempted. I therefore read this covenant as if it were, that 120*l.* should be paid to the defendant for outward freight at Maranham, and that as much more as might be necessary for the ship's disbursements should be advanced by way of freight, and that the residue should remain subject to the contingency of the ship's arrival and delivery of the goods at their place of destination. A part was to be free from all contingency, the residue was to abide the contingency. Thus it appears to me, upon the plain meaning of the instrument now before us, and without looking to other cases which apply to different forms of covenanting from the present, that this money was received at Maranham as freight, and that it is distinguished by the provision respecting the residue from that part of the freight which was to abide the ordinary contingency imposed by the law. I therefore think that inasmuch as it is freight, the plaintiff is not entitled to recover in this action.

Le Blanc, J. I agree to the construction which has been put by my

Lord upon this charter-party. The plaintiff has advanced a sum of money to the defendant at Maranham, which he now seeks to recover, upon the ground that it was advanced by way of loan, or as a payment by anticipation of freight which was not then nor has ever since been earned. It is open to the parties to such contracts as the present to make such stipulations, consistently with law, as they shall please. And here the parties have contracted for the letting and taking the ship to freight on a voyage to Maranham and back to Liverpool, and for the payment of a specific sum for the outward freight to Maranham, and for the homeward freight they contract to pay according to a specific rate of payment upon the goods to be delivered. But they also contract in what manner this freight shall be paid, that is, that the outward freight, together with so much of the freight home as should be necessary for the disbursements of the ship at Maranham, should be paid in advance when required, and the residue of such freight to be paid upon delivery of the homeward cargo at the place of destination. Now there can be no doubt that it is competent to parties to stipulate for part-payment of the freight before it can be known whether any freight will accrue or not. And have they not so stipulated by this charter-party? If it was intended that what was advanced at Maranham should be returned in the event that has happened, the parties might have provided for it by their contract. That this question has not yet come before the courts can only be accounted for by supposing that persons have not been advised to attempt the question, because undoubtedly there must have been many cases before this, in which the parties have stipulated for a payment of freight in advance ; indeed such cases are very common, and it must very often have happened that the ship has not arrived. And what has happened still more often, is that wages have been stipulated for and paid in advance at a particular period of the voyage, which is similar to the present case, and yet I believe no action has ever been brought to recover back such wages from those capable of paying, on the ground that no freight was earned, and therefore wages were never due. It is impossible to consider this as a loan of money, because of the exception by which it is made free from interest and commission, and because also "the residue of such freight" is made payable upon the ship's arrival. This covenant, therefore, must be understood as a covenant for the payment of the freight in different modes, some part of it upon the arrival of the ship at Maranham, and the rest to abide the contingency of the ship's return to her port of destination. It is clear therefore the plaintiff is not entitled to recover.

Bayley, J. Wherever there is an express stipulation that the party who is to be entitled to freight shall be paid any portion of it in advance, there ought also to be an express stipulation that the party paying it shall be entitled to recover it back, if freight be not earned, if such be the intention of the parties to the instrument. For without some provision of that sort how are we to raise a new implied contract to that effect? It seems clear

that the parties to this instrument have stipulated for a partial payment in advance by way of freight and not as a loan; for after settling the amount and rate of freight to be paid for the voyage out and home, they stipulate that such freight shall be paid as follows, that is, the outward freight to Maranham, and as much cash as should be necessary for the ship's disbursements in Maranham to be advanced by the freighter when required, free from interest and commission, at the current exchange of the place, and the residue of such freight on the delivery of the homeward cargo. Therefore, taking the whole of the clause together, it seems to me that this payment is to be considered as a payment of so much of the freight in advance. And if that be so, upon what ground is it to be recovered back? It is suggested as a ground, that the freight has failed by the non-performance of the voyage, and thus the plaintiff has derived no benefit from it; but what benefit has the defendant derived? He also has lost as well as the plaintiff, and the question is, whether he is to bear a farther loss. Now in order to maintain money had and received, it is in general incumbent upon the plaintiff to show that the defendant has money of the plaintiff which in equity and good conscience he ought not to detain from him. But here the question raised is not whether the defendant has money which he ought not to detain, but whether out of his own money he shall be bound to make good that which the plaintiff has lost. It seems to me that the defendant shall not be so bound.

Dampier, J. It has been argued upon the words of this charter-party, that "as much cash as may be found necessary for the vessel's disbursements in Maranham, to be advanced by the plaintiff to the defendant," imports a loan of money, and not a payment of freight. And if those words stood alone, and unexplained by the other part of the clause, I should have thought they might have been subject to such a construction. But taking the whole clause together I think it is not so. It stipulates for the payment of such freight, that is, the outward and homeward freight; the outward freight and so much cash as should be necessary for the ship's disbursements in Maranham, to be advanced at the current exchange of the place; and then it adds that the residue of such freight shall be paid on the delivery of the cargo. So that it contemplates the whole as freight; and beside, the exemption from interest and commission tends to show that it was not a loan.[1] I think it impossible therefore upon the whole of this

[1] If in the present case, which is to be decided according to English law, the advance could be treated as a loan, it might be necessary to consider that case with the utmost attention, . . . but it would, as it seems to me, be impossible to hold that it was, without overruling all the cases on this subject, or the doctrine assumed in all that have been decided since the time of Charles II. . . . Although I have said that this course of business may in theory be anomalous, I think its origin and existence are capable of a reasonable explanation. It arose in the case of the long Indian voyages. The length of voyage would keep the shipper for too long a time out of money; and freight is much more difficult to pledge as a security to third persons than goods repre-

clause to consider this payment as a loan. Then the question is, whether freight *eo nomine* may not be stipulated to be paid in advance; and upon that I think there can be no doubt that it may. As little doubt exists in my mind that this is a stipulation of that nature to pay a portion of the freight in advance, and it does not appear that there is any covenant that the party shall recover it back in the event of freight not being earned. Therefore it does not seem to me that the defendant has received money which he keeps against good conscience. And if so the plaintiff is not entitled to recover.

Judgment of nonsuit.

WRIGHT *v.* NEWTON.

In the Exchequer, Easter Term, 1835.

[*Reported in* 2 *Crompton, Meeson, and Roscoe,* 124.]

Assumpsit for money had and received. Plea, *non assumpsit.*

At the trial before Alderson, B., at the last Lancaster assizes, it appeared that the defendant, being in the occupation of a public-house, and being desirous of leaving it, entered into a verbal agreement with the plaintiff for the sale to him, on behalf of a Mrs. Williams, of the good-will and fixtures of the house, at the sum of 120*l.*, 50*l.* of which was to be paid on the Monday after, if the landlord consented to the change of tenancy, and on payment of the remainder of the money the defendant was to give up possession. The 50*l.* was paid to the defendant on the 19th of May, and on the 20th, on application being made to the landlord, he verbally agreed to accept Mrs. Williams as tenant. In consequence of this, Mrs. Williams, for whom the house had been taken by the plaintiff, removed, and took her furniture to the defendant's house, and went to reside there, and continued there for five or six weeks, and carried on the business, but the defendant and his wife also continued to reside there. It appeared, that, on the 2d of June, the landlord withdrew his consent to accept Mrs. Williams as tenant. The defendant on being informed of this, said that Mrs. Williams might keep his, the defendant's, name up, and he would give possession in spite of the landlord. Mrs. Williams subsequently, by the defendant's consent, took away her furniture, but the defendant refused to return the 50*l.* The defendant afterwards sold the good-will and fixtures to another person, who was accordingly let into possession. This action was brought to recover back the sum of 50*l.*, as money had and received for the use of the plaintiff. The learned Baron left it to the jury to say whether the

sented by a bill of lading. Therefore the shipper agreed to make the advance on what he would ultimately have to pay, and for a consideration, took the risk in order to obviate a repayment, which disarranges business transactions. — Mr. Justice Brett, in Allison *v.* Bristol Marine Ins. Co., L. R. 1 Ap. Cas. 209, 225. — Ed.

parties had agreed to rescind the contract, and if they were of that opinion, he directed them to find a verdict for the plaintiff; which they accordingly did.

Cresswell now moved by leave of the learned BARON to enter a nonsuit.

PARKE, B. — It seems to me that this was a contract with a condition that the landlord's consent should be obtained; and the question is, has that condition been performed? There was a deposit of 50*l.* made upon the landlord's agreeing to take Mrs. Williams as tenant, but the remainder of the money not having been paid, and Mrs. Williams not having entered into possession as tenant, the landlord subsequently withdrew his consent. I think it must be taken as if the landlord never has consented; and if so, the condition has not been performed. There would be nothing to bind the landlord unless there had been an actual transfer of the possession. The money was paid on a consideration which has failed, and therefore the plaintiff is entitled to recover it back, as money had and received to his use. The simple question is, whether the landlord's consent of the 19th of May was binding upon him? I think it was not, and therefore the condition was not performed. There must be no rule.

BOLLAND, B. — The consent would have been sufficient if Mrs. Williams had acted upon it before it was withdrawn, by paying the remainder of the purchase-money, and getting into possession as tenant. As it was withdrawn before Mrs. Williams took possession as tenant, I think that the verdict was right.

ALDERSON, B. — I think that the defendant never gave up possession to Mrs. Williams as tenant. He kept possession of the house for a very good reason; because the remainder of the purchase-money was not paid.

Rule refused.

HIRST *v.* TOLSON.

IN CHANCERY, BEFORE SIR LANCELOT SHADWELL, V. C., APRIL 25, 1849.

[*Reported in* 16 *Simons*, 620.]

IN November, 1845, Sarah Hirst, widow, articled her son, Henry, to Richard Tolson, a solicitor and attorney, for five years, and paid Tolson a premium of 200*l.* By the Articles, Mrs. Hirst, for herself, her executors and administrators, covenanted to provide her son with board, lodging, and clothes; and Tolson, for himself, his executors and administrators, covenanted with Mrs. Hirst to instruct her son or cause him to be instructed in the business or profession of an attorney and solicitor which he then did or should, at any time thereafter during the term, use or practise; and, at the end of the term, to use his best endeavors to procure him to be admitted an attorney and solicitor.

In October, 1847, Tolson died: the defendants were his executors. After his decease, Mrs. Hirst applied, to a judge at Chambers, to order the defendants to return a portion of the premium: but the learned judge dismissed the application, on the ground that he had no jurisdiction to make the order against the executors of an attorney. Mrs. Hirst and her son then filed the bill in this cause, praying that the defendants might be decreed to return to her a just proportion of the premium, out of Tolson's assets.

The defendants stated, in their answer, that, after Tolson's death, they arranged with a gentleman named Clough, whom Tolson had taken into partnership with him shortly before his death, to take Henry Hirst as his clerk, for the remainder of the five years, without any premium; that Henry Hirst continued in the office for about ten days after Tolson's death, and then left it without assigning any reason for so doing; and that the defendants had since offered, but without admitting their legal liability, to refer the matter to the arbitration of any respectable solicitor; but that Mrs. Hirst had rejected their offer.

Mr. *Bethell* and Mr. *Rogers* for the plaintiffs.

Mr. *Roundell Palmer* and Mr. *Amphlett* for the defendants.

The Vice-Chancellor. In this case, it is alleged that a debt has accrued to the plaintiffs, and they are seeking to obtain payment of it out of assets. The case, therefore, is plainly distinguishable from the case of May *v.* Skey,[1] which I decided a few days ago. In that case, a lady had advanced money to a married woman (whose husband had gone abroad and left her wholly unprovided for) to enable her to procure clothes and other necessaries; and the lady sued the husband for the money. In the course of the argument two cases were cited in which the court had ordered money advanced under similar circumstances, to be repaid. But, in each of those cases, the husband was dead, and the suit was against his assets. In May *v.* Skey, however, the husband was alive, and, therefore, I held that the bill would not lie; for the court has no jurisdiction to order a debt to be paid by the debtor himself.

In this case it appears, on the face of the articles, that there is a debt: what the amount of it is, I do not say: *that* must be determined by the Master: but, there being a debt and payment of it being sought out of the assets of a person who is dead, I am clearly of opinion that it is a case in which this court has jurisdiction. Therefore I shall refer it to the Master, to ascertain what part of the premium ought to be returned; and, as the defendants admit assets, I shall order them to pay to the plaintiffs what the Master shall ascertain; and to pay the costs of the suit also.[2]

[1] 16 Sim. 588. [2] Affirmed on appeal, 2 Mac. & G. 134. — Ed.

KNOWLES *v.* BOVILL AND ANOTHER.

IN THE EXCHEQUER, FEBRUARY 10, 1870.

[*Reported in* 22 *Law Times Reports*, 70.]

THE plaintiff was a mill-owner and miller carrying on business at Nuneaton, in the county of Warwick. The defendants were the executors of the late Geo. Hinton Bovill, an engineer and patentee of certain improvements in the manufacture of wheat and other grains into meal and flour. Letters-patent bearing date the 5th June, 1849, were granted to the said Geo. Hinton Bovill for the said invention, for the term of fourteen years from that date.

Afterwards further letters-patent bearing date the 6th June, 1863, were granted to the said Geo. Hinton Bovill for the extension of the patent for the said invention, for the term of five years from and after the expiration of the said original letters-patent. In the month of March, 1864, the plaintiff purchased from one Thomas Hollick the mill wherein he has since carried on his said business, together with the good-will and the stock and effects thereof.

Shortly after the plaintiff had purchased the said mill, actions were commenced by the said Geo. H. Bovill against the said Thomas Hollick and the plaintiff respectively for infringement of the said patent by the user, in the said mill, of certain machinery alleged to be an infringement of the said patent.

The said actions were settled by payment to the said G. H. Bovill of 500*l.*, and by an agreement for the purchase of the right or license to use the said letters-patent at the said mill for the residue of the term of the said letters-patent, for the sum of 560*l.*, and on the 6th March a deed was executed for the purpose of carrying out the arrangement for a settlement of the said action. On the same day the said 560*l.* was paid to the said G. H. Bovill and a receipt given.

The plaintiff, having heard that G. H. Bovill was about to take measures for the purpose of having the said invention protected for a further period, instructed his solicitors, Messrs. Hall and Janion, to communicate with Mr. Bovill on the subject, and they accordingly, on the 15th April, 1868, wrote the following letter to the said G. H. Bovill: —

SIR, — You may perhaps remember that we had a correspondence with you some time ago, we acting on behalf of Mr. Knowles, relative to an infringement by the late Mr. Hollick of your patent at his mills at Nuneaton. You will also probably recollect that Mr. Hollick paid your claim, and the matter was amicably adjusted. Both Mr. Hollick and Mr. Knowles

declined to join in the Millers' Association. We are now informed that it is your intention to apply for an extension of your patent, and though we are given to understand that your application will be opposed, Mr. Knowles wishes us to say on his behalf that he has no wish to be a party to such opposition, provided he can make a satisfactory arrangement with you in the event of your patent being renewed, and we should therefore be glad to hear from you on the subject.

A correspondence ensued, and finally the following letter was written by plaintiff's attorney to the said G. H. Bovill :—

Dear Sir, — The prevailing opinion of millers in this part of the country is, that you will not succeed in obtaining a renewal of your patent, and having regard to the uncertainty on this point, Mr. Knowles is not disposed to give so much as 250*l.* down, but he will give 150*l.* for the free use of your patent for ever, and of the improvement you contemplate making in it as mentioned in your previous correspondence.

To this letter Mr. Bovill wrote the following answer : —

"In reply to your favor of yesterday, as I do not wish to have any opposition to my prolongation, I will accept Mr. Knowles's offer of 150*l.* for the free use for ever of the 1849 patent for whatever time it may be further prolonged or not prolonged, as well as the free use for three years, as mentioned in my letter (say until the 1st May, 1871), of the new patent for milling, which I am about to take out as soon as I am well enough to return to business."

The plaintiff paid the sum of 150*l.* in accordance with the arrangement contained in the above correspondence, and Mr. Bovill signed the following receipt : —

" Received from Mr. John Knowles the sum of 150*l.* for the free use for ever of my existing patents relating to and as applied to corn mills, and also for the free use for the period of three years from the grant thereof of a new patent for milling, which I am about to take out."

The said G. H. Bovill died on the 9th May, 1868, a few days after the receipt of the 150*l.*, and in consequence of his illness and subsequent death, neither he nor the defendants, his executors, ever took or have taken any measures for obtaining a prolongation of the said letters-patent for a further period, nor did he take out, nor have the defendants ever taken out, the said new patent for milling previously referred to, but the said G. H. Bovill had been engaged from the latter end of the year 1867 up to the time of his last illness and death in perfecting his improvements for which he proposed to take out the new patent.

Upon the death of Mr. Bovill, the plaintiff's attorneys wrote the following letter to his executors: —

"In May last we, on behalf of Mr. John Knowles of Nuneaton, paid the late Mr. Bovill 150*l.* for the free use for ever of the 1849 patent, for whatever time it might be prolonged, as well as the free use for three years of the new patent for milling Mr. Bovill was about to bring out. Unfortunately Mr. Bovill died a few days after the money was paid, and we suppose no application has been, or will now be made for a prolongation of the 1849 patent, and that our client will lose the benefit of the new patent which Mr. Bovill intended taking out. This being so, it appears to us that the consideration in respect of which Mr. Knowles paid the sum of 150*l.* wholly fails, and that Mr. Bovill's executors will not object to repay that sum to Mr. Knowles."

To this letter the defendant's attorneys sent the following answer: —

"The executors of Mr. Bovill have handed us your letter of the 28th inst. We do not agree with your construction. Your clients made a bargain for better or worse; if the application had been refused, would you then have claimed a return of the money? There is no covenant nor agreement by Mr. Bovill to apply. The consideration was only partly for the 1849 prolongation if granted, the chief consideration was for another invention of Mr. Bovill's. Had this been secured by him, your client might have received a very large benefit at a very nominal sum, and so the right to call on Mr. Bovill for a license of such new invention, if brought out, was an ample consideration, and of great value. Put the very frequent case of a person taking a license without a warranty of validity, and the patent being subsequently upset, and that too within a year of the license, which may, for argument's sake, have been for fourteen years. It has been held, over and over again, that the licensee must continue his payments. He has had all he bargained for. Here Mr. Knowles has had all he bargained for, the right to call upon Mr. Bovill practically to give him for nothing a very valuable right. We see no ground, morally or equitably, upon which your client can ask for a rebate or return of the 150*l.* It was clear Mr. Knowles thought the renewal was of a very questionable nature, but he bargained with Mr. Bovill for the 150*l.* to shut out every contingency."

The question for the court was, whether the plaintiff was entitled to the return of the 150*l.*

Quain, Q. C., for the plaintiff.

Garth, Q. C., with him *J. C. Mathew*, for defendants.

MARTIN, B. — In my opinion the plaintiff is entitled to our judgment. The true test in this case is the question, What did he buy? In my opinion he bought an application for the grant of one patent and the

prolongation of the other. By the contract he was to take the chance of the failure or success of such application. But what he bought was an application. The result is that the consideration in this case wholly fails, because it is admitted such application never was and now never will be made. The law in some cases implies a contract when the parties have not expressly made one. In cases of the total failure of consideration for a simple contract, it implies a contract to repay the money which has been paid for the consideration that has so failed. If I thought Mr. *Garth's* contention were correct, and that plaintiff only bought the chance whether an application would be made and prove successful, the case might be different, but I do not think that is the true meaning of the contract.

Bramwell, B. — I am of the same opinion. The plaintiff manifestly paid his money for the right to have an application made for the renewal of the one patent and the granting of the other. It cannot be doubted that if Mr. Bovill had lived and no application had been made, the plaintiff would have been entitled to recover his money. From this it is perfectly clear he bought the right to have such application made. In point of fact it was not made. Then why is his claim not well founded? Mr. *Garth* invokes a rule of law; he claims to read such a contract with a qualification implied by law that Mr. Bovill is only bound to make such application if he lives; he is to be excused by death. Mr. *Quain* may fairly say then, "I am entitled to add a qualification to that qualification, viz., that if he dies the money shall be returned." I am strongly of opinion that the law ought never to imply terms in a contract unless the justice or necessity of the case obviously and imperatively demands it. But if a party contends that there is such a qualification when the engagement is of a personal character, how can he object to the qualification being qualified as I have pointed out? Can anything be more obviously just and reasonable? Why should the contractor's death be a benefit to his estate, and inflict a loss on the other party? In such a case the court only introduces a term which it is satisfied, not perhaps that the parties intended, but that they would have intended if they had contemplated the circumstances which have arisen.

Pigott, B. — I am of the same opinion. It is quite clear that the intention of the parties was that there should be an application for these patents, and that such application formed the consideration for the payment of the money. There never was any such application, and consequently the consideration wholly failed.

Cleasby, B. — It is clear that what plaintiff bought was the chance of Mr. Bovill being successful in his application or not, not the chance of his making it or not; that would have left it in his option to make it or not, whereas it was admitted if he had lived and not made it the plaintiff would have recovered.

Judgment for plaintiff.

WHINCUP *v.* HUGHES, EXECUTRIX.

IN THE COMMON PLEAS, JANUARY 27, 1871.

[*Reported in Law Reports, 6 Common Pleas,* 78.]

ACTION in the Salford Hundred Court against the defendant as executrix of Thomas Rogers Hughes, deceased.

The first count of the declaration stated that the testator covenanted with the plaintiff to instruct one George Whincup, the younger, during the term of six years, from the 31st of July, 1868, in the business of a watchmaker and jeweller. Breach, that he did not so instruct him.

Second count, for money had and received by the testator for the use of the plaintiff, and for money had and received by the defendant as executrix, for the use of the plaintiff.

Third plea (*inter alia*) to the first count, that after the making of the said covenant, and after the said Thomas Rogers Hughes had for the space of twelve months instructed the said George Whincup, the younger, in his said business according to his said covenant, the said Thomas Rogers Hughes died, and was thereby prevented from any further performance of his said covenant.

To the rest of the declaration, never indebted. .

Issues and demurrer to third plea.

At the trial the facts appeared to be as follows: The plaintiff had apprenticed his son to the defendant's testator, a watchmaker and jeweller, by a deed bearing date the 26th of November, 1868, for the term of six years, to be computed from the preceding 31st of July. The plaintiff covenanted to pay a premium of 25*l.* to the master, and provide the apprentice with food and clothing during the term, in consideration whereof the master covenanted with the plaintiff to instruct the apprentice in his business, and to pay him wages according to an ascending scale, commencing at 4*s.* per week during the first year, and ending at 10*s.* per week in the last year of the term. The plaintiff paid the premium, and the apprentice was duly instructed up to the 14th of November, 1869, when the defendant's testator died.

The learned judge, upon these facts, held that the covenant to instruct the apprentice was a merely personal covenant, which was put an end to by the testator's death, and that the plaintiff could not, therefore, recover on the first count; but he held that the plaintiff might recover a part of the premium paid under the common counts, on the ground of failure of consideration. The verdict was thereupon entered for the plaintiff for the sum of 15*l.*, the amount found by the judge, to whom the question of

amount was left by consent; leave being reserved to the defendant to move to enter a nonsuit, on the ground that neither the premium paid at the commencement of the apprenticeship, nor any part of it, was recoverable back, the consideration for its payment not having failed, either wholly or as to any apportionable part.

A rule *nisi* had been accordingly obtained, against which

J. W. Mellor showed cause.

G. B. Hughes supported the rule.

Bovill, C. J. This is an action brought to recover a part of the premium paid upon the execution of an apprenticeship deed, on the ground of failure of consideration. The general rule of law is, that where a contract has been in part performed no part of the money paid under such contract can be recovered back. There may be some cases of partial performance which form exceptions to this rule, as, for instance, if there were a contract to deliver ten sacks of wheat and six only were delivered, the price of the remaining four might be recovered back. But there the consideration is clearly severable. The general rule being what I have stated, is there anything in the present case to take it out of such rule? The master instructed the apprentice under the deed for the period of a year, and then died. It is clear law that the contract being one of a personal nature, the death of the master, in the absence of any stipulation to the contrary, puts an end to it for the future. The further performance of it has been prevented by the act of God, and there is thus no breach of contract upon which any action will lie against the executor. That being so, can any action be maintained otherwise than upon the contract? The contract having been in part performed, it would seem that the general rule must apply unless the consideration be in its nature apportionable. I am at a loss to see on what principle such apportionment could be made. It could not properly be made with reference to the proportion which the period during which the apprentice was instructed bears to the whole term. In the early part of the term the teaching would be most onerous, and the services of the apprentice of little value; as time went on his services would probably be worth more, and he would require less teaching. There appears to be no instance of a similar nature to the present in which an action for the return of a part of the premium has been brought. There have been attempts to recover part of the premium in the case of articled clerks. In *Ex parte* Bayley [1] which has been cited, the decision was not put on the ground of legal liability, but of the authority exercised by the court over one of its own officers. In the case of *Re* Thompson,[2] than which a stronger case could hardly exist, inasmuch as there the clerk died within a month after a premium of over 200*l.* was paid, an application was made to the court in the exercise of its summary jurisdiction, but they declined to order the return of any part of the premium. It was assumed in that case

[1] 9 B. & C. 691. [2] 1 Ex. 864.

that no action at law could lie, for otherwise the application would have been unnecessary. Thus it appears that even on application to the extraordinary jurisdiction of the court over its own officer, the Court of Exchequer deliberately came to the conclusion that neither in law nor in justice was there any right under such circumstances to a return of premium. With regard to the justice of such a case, it is clear that it would be almost impossible to estimate what the master might on his side have lost by the loss of the service of the apprentice. Again, the person receiving the premium naturally assumes that it becomes his property to be dealt with as he pleases; he is perfectly ready to perform his part of the contract; he never undertakes to return any part of the premium, and the necessity for such return is never contemplated. We have been pressed with the authority of the case of Hirst *v.* Tolson,[1] where, an attorney having died, the Lord Chancellor ordered the return of a part of the premium paid by an articled clerk. But this decision expressly proceeded on the supposition that such part of the premium would be a debt in law, although the Lord Chancellor came to the conclusion that under the circumstances it was not necessary to send the plaintiff to seek a remedy in a court of law, but he might recover in equity. The Lord Chancellor refers to the case of Stokes *v.* Twitchin[2] as establishing the principle that where there is such a partial failure of consideration, an action is maintainable. On referring to that case it appears that it is no authority for any such proposition. In that case the indenture was void for breach of the provisions of a statute. The plaintiff claimed the whole premium back on the ground of total failure of consideration. There is no doubt that money had and received will lie upon such a failure of consideration, though the plaintiff failed in that case on the ground that he was himself party to the illegality.

With regard to the equity of the case, the Lord Chancellor refers to two former decisions in the time of Vernon and Finch, which appear to be Soam *v.* Bowden[3] and Newton *v.* Rouse.[4] On referring to the report of the former case in Finch, it appears that there the master had received a premium of 250*l.* and died within two years, and a bill having been filed against the executors for the return of a portion of the premium, it is stated that the executors said that they would be willing to do whatever the court should direct in the matter. It is quite consistent with this report that the executors really did not contest the point, but submitted to what the court might, under the circumstances, think just. The case of Newton *v.* Rouse[4] is certainly a very remarkable case, because there the agreement contained an express provision that in case of death 60*l.* should be returned, and on a bill being filed, the court decreed the return of 100*l.* This is certainly wholly inconsistent with the principles regulating the interpretation of contracts both at law and equity. The only possible ground on

[1] 2 Mac. & G. 134; 19 L. J. Ch. 441.
[2] 8 Taunt. 492.
[3] Finch, 396.
[4] 1 Vern. 460.

which the decision can be explained is that mentioned by the note to the case in the 3d ed. of Vernon, by Mr. Raithby, and referred to in 1 Story's Equity Jurisprudence, 10th ed., p. 472, viz., that it must have been a case of mutual mistake, misrepresentation, or unconscientious advantage taken by one side of the other. Under these circumstances, it does not appear to me that the case of Hirst *v.* Tolson [1] is a satisfactory authority or one by which we are bound. It appears to be based on a misapprehension of the law on the subject, and is distinctly contrary to the opinion of the Court of Exchequer in *Re* Thompson.[2] For these reasons I think the rule ought to be made absolute.

Willes, J. I am of the same opinion. We have no jurisdiction to override the intention of the parties as expressed in the contract of apprenticeship. The effect of that contract is clear. In consideration of the premium the master undertakes to teach, and the apprentice undertakes to serve for a period of six years if they both shall live so long. If this, which is the true legal construction of this contract, were set out in so many words, it would seem extraordinary that there should be any claim for a repayment of premium on the death of either of the parties. But it is a well-known rule of law that every contract must be construed as if those terms which the law will imply were expressly introduced into it. Such being the contract, if the apprentice died, could the master be called upon to refund any part of the premium? No suggestion to that effect was made. Then why should there be any difference in case of the master's death? In some particular cases there might be a reason. There might be a custom in relation to the subject. No suggestion is made of any such custom here, but in 2 Williams on Executors, 6th ed. p. 1631, a custom in London is mentioned, that in such a case the executors shall get the apprentice transferred to some other master of the same trade. In such a case, however, the action must be on the custom, not for money received.

The decision in the case of Hirst *v.* Tolson [1] does not appear satisfactory, for the reasons given by my Lord. With the utmost respect to the authority of the eminent Chancellor who decided it, with regard to the question of equity, I must confess that the justice of that decision appears to me very doubtful. The executors there seem to have offered to get the clerk placed in the office of another attorney without premium, and that having been declined they were made to refund money which the testator had probably spent long before his death without ever contemplating the necessity of refunding it. I must say that the doctrine of the common law which, except in the instance of the paternal or masterful jurisdiction of the court over its own officers, does not compel any return on the partial failure of consideration, appears to me on the whole preferable to an equity so doubtful as this. In 1 Williams' Saunders, p. 313, the case of an apprentice running away is mentioned, and Cuff *v.* Brown [3] is referred to,

[1] 2 Mac. & G. 134; 19 L. J. Ch. 441. [2] 1 Ex. 864. [3] 5 Price, 297.

where in such a case, the master having refused to take back the apprentice, the court held that it could not order any return of premium. It is there stated that in the case of an attorney's clerk the Court of King's Bench decided otherwise, considering that they had a more extensive authority, and the cases of *Ex parte* Prankerd [1] and *Ex parte* Bayley [2] are referred to as instances. In 2 Williams on Executors, 6th ed. p. 1631, the case of Hirst *v.* Tolson [3] is treated as applicable to attorneys only, and being an exercise of the equitable jurisdiction of the Court of Chancery.

Montague Smith, J. I am of the same opinion. Independently of the rule of law, that an action for money had and received can only be brought when there is a total failure of consideration, with the exception of a few cases which, on being analyzed, hardly prove to be exceptions, I think this case is clear as a question of intention between the parties. The contract is a written one, and if on a consideration of its terms we should come to the conclusion that the parties did not mean that in case of death there should be a return of the premium, the defendant will, of course, not be liable. The contract is, that in consideration of 25*l.* paid at the time of its execution, the master will teach for six years; and the contract is subject to an implied condition that both parties should so long live, for, being a mere personal undertaking, it is only in such case that it can be performed. Now, I cannot imply from such a contract that the parties meant that in case of death any part of the premium should be returned. If they had so meant there would have been no difficulty in expressly providing for such a contingency. We should, I think, be doing violence to the terms of the instrument if, as a presumption of law or fact, we added any such condition. The parties must be taken to have considered the possibility that one of them might die. In the case of the apprentice's death, or permanent illness during the later years of the term, the loss to the master might be considerable; might be even of greater value than the premium, for the services form a considerable part of the consideration for the master's contract. The master in such case could recover no compensation for his loss: see Boast *v.* Firth.[4] Under these circumstances, it seems to me that the parties, if they intended that there should be any return of premium, would have provided for it. Moreover, it appears to me clear that the action for money received cannot lie where the contract has been partly performed on both sides. To ascertain the amount which equity in such a case requires to be returned, it would be necessary to go into a great variety of considerations, the relative weight of which it would be almost impossible correctly to estimate: *e.g.*, the value of the service lost to the master, and the degree to which the apprentice had profited by the instruction. It would be impossible to take merely the proportion of the time which had elapsed to the whole term as the standard of measurement.

[1] 3 B. & A. 257.
[2] 9 B. & C. 691.
[3] 2 Mac. & G. 134; 19 L. J. Ch. 441.
[4] L. R. 4 C. P. 1.

My Lord and my Brother WILLES have gone so fully into the authorities that I need say nothing further about them, except that the mere fact that, while similar cases to the present must be of such frequent occurrence, no case of an attempt to recover back part of the premium is to be found in the books, except with respect to an articled clerk, is of itself an authority against the plaintiff.

BRETT, J. I am of the same opinion, and to my mind the case is very clear. By the contract a specific sum is paid to the testator in respect of a continuing consideration, viz., a personal duty to be performed for six years if both parties should live so long. There is no express stipulation for any return of the premium or any part of it. The death of the testator is no breach of the contract, and the question therefore is, whether, there being no breach on his part, his executors can be made to return the premium or any part of it. Now the case cannot be brought within the rule of law relating to total failure of consideration, or mutual rescission of a contract. It comes within the rule that where a sum of money has been paid for an entire consideration, and there is only a partial failure of consideration, neither the whole nor any part of such sum can be recovered. No authority has been cited in favor of the plaintiff at common law. I express no opinion as to the decisions in equity that have been cited, inasmuch as we are not now exercising an equitable jurisdiction, and, therefore, they do not appear to me applicable. The decisions with regard to articled clerks seem to be strong authorities for the defendant, inasmuch as even when the court did interfere to compel a return of the premium, they felt obliged to justify the strong measure of exercising jurisdiction to modify the contract of the parties, by saying that they did so in the exercise only of their authority over their own officer.

Rule absolute.

ANGLO-EGYPTIAN NAVIGATION COMPANY *v.* RENNIE AND ANOTHER.

IN THE COMMON PLEAS, FEBRUARY 25, 1875.

[*Reported in Law Reports*, 10 *Common Pleas*, 271.]

SPECIAL CASE stated in an action for the detention of certain boilers and machinery, and for the recovery of two sums of 2000*l.* paid by the plaintiffs to the defendants.

The facts of the case sufficiently appear from the judgment.

H. Matthews, Q. C., *Arthur Wilson* with him, for the plaintiffs.

Benjamin, Q. C., for the defendants.

Feb. 25. The judgment of the court (Lord COLERIDGE, C. J., and GROVE and DENMAN, JJ.,[1]) was delivered by

DENMAN, J. This was a special case stated without pleadings in an action in which the plaintiffs claimed to recover certain boilers and machinery detained by the defendants, with damages for their detention, or to recover back two sums of 2000*l.* each, paid by the plaintiffs to the defendants as stated in the case. In case our judgment should be for the plaintiffs for the recovery of the goods, judgment was to be entered for 5000*l.*, to be reduced to 40*s.* on the goods being delivered up. In case we should decide for the plaintiffs on the other ground, judgment was to be entered for 4000*l.* The two questions for the court therefore are, whether, under the circumstances of the case, either detinue or money had and received could be maintained.

The material facts of the case were as follows: On the 18th of December, 1871, the plaintiffs, a shipping company in London, being owners of two steamships, the Minia and the Scanderia, entered into a written contract with the defendants, engineers in London, which is set out in the special case, and the terms of which, so far as they are material, are as follows:—

The engineers agree to make and supply to the company new marine boilers and various parts of machinery for the screw-steamers Minia and Scanderia belonging to the company, and to alter the engines of those steamers into compound surface condensing engines, according to specification annexed. The engines and boilers and connections are to be completed in every way ready for sea so far as specified, and tried under steam by the engineers previous to being handed over to the company; the result of such trial to be to the satisfaction of the company's inspector.

The work to be commenced without delay, and completed with all reasonable dispatch. Due notice shall be given by the company to the engineers of the date at which the steamers will be placed in their hands after the work is ready, to have the engines completed. Each of the steamers shall be completed ready for sea within sixty working days from the date at which she is placed in the hands of the engineers.

The price to be paid by the company to the engineers in respect of this agreement shall be the sum of 5800*l.* for each steamer, payable as the work progresses, in the following manner, viz. When the boilers are plated, 2000*l.*, half cash, half by the company's acceptance at four months' date; when the whole of the work is ready for fixing on board, 2000*l.*, half cash, half by the company's acceptance at four months' date; when each steamer is fully completed and tried under steam, 1800*l.*, whereof 1000*l.* cash, and 800*l.* in acceptances at four months. All bills to be approved.

The contract then contained a guarantee by the engineers against bad

[1] KEATING, J., who heard the argument, had resigned at the end of Hilary term.

materials or workmanship, and an undertaking to make good for six months; and then it continued as follows: —

"All the work hereby contracted to be done by the engineers shall be executed to the satisfaction of John Pile, or other the company's inspector for the time being; and all the payments agreed to be made by the company shall only be made on the certificate of such inspector that the conditions entitling the engineers to receive such payment have been fulfilled."

The contract contained an arbitration clause.

The specification referred to in the contract was headed "The work hereby specified to be done to each of the steamers Minia and Scanderia," and contained, amongst other matters, the following provisions and requirements: —

"Four new boilers of oval form to be fitted and fixed on board; each boiler to have two furnaces, and to be provided with all necessary fittings," etc.; "the boilers to be cleaded with felt and wood, or patent cement, as may be determined, with all necessary piping to fit and fix them to the engines; funnel casings to be removed and replaced; old boilers to be cut up in ship, and removed in pieces, so as not to disturb the deck."

Then followed provisions relating to alterations to be made in the cylinders, and providing several articles, such as new cylinder covers to be put on the old cylinders, with glands, slide-rods, and "all that may be necessary to make the engines complete compound and surface condensing engines."

Then followed a provision that a surface condenser containing 2000 cubic feet of tube cooling surface was to be supplied; and immediately afterwards it was specified as follows: "One of the present air-pumps to be arranged as a circulating pump; both the pump and the other air-pump now in the ship to have foot-valves fitted, if they are not so at present;" "waste-water valves to be fitted to ship; the present waste-water valve chest to remain for the air-pumps' discharge;" "all present piping in connection with boilers to be condemned, and replaced with copper piping sufficient to bear the increased pressure;" "all brasses to be set together, and the whole job to be put in thorough working order so far as the new work is concerned;" "in conclusion, it is intended that the engineers shall remove the present boilers and such parts of the machinery as may be necessary to make the above alterations, giving new boilers and complete machinery instead, and so as to comply with the requirements of the Board of Trade, whose certificate they are to obtain as far as the work which they engage to do extends."

The case finds that under the contract the whole of the old materials to be necessarily taken from each ship by reason of the execution of the work contracted to be done would become the property of the defendants, and that the value of such old materials in each ship was 353*l.* At the date of the contract, the 18th of December, 1871, the Scanderia was in the

port of London. The contract, so far as relates to the Minia, was performed on both sides; and no question arises as to that ship.

On the 28th of June, 1872, the plaintiffs gave notice to the defendants that the Scanderia was ready to be placed in their hands on the 1st of August next, to receive her boilers and machinery. But, upon hearing from the defendants on the 28th of June that they could not promise to be ready by the 1st of August, the plaintiffs determined to send her on another voyage. She sailed from Cardiff accordingly in August, and on her return voyage was lost by perils of the sea.

On the 15th of August, 1872, the boilers for the Scanderia were plated. On the 27th of August the plaintiffs' inspector certified that the defendants were entitled to receive the first sum of 2000*l.* in respect of that ship; and on the 28th of August the plaintiffs paid the same in the manner provided by the contract.

On the 4th of January, 1873, the whole of the work was ready for fixing on board the Scanderia, and on the 15th the plaintiffs' inspector so certified, and that the conditions entitling the defendants to the second sum of 2000*l.* had been fulfilled; and the plaintiffs on the 17th of January paid that sum as before. At the time of the last-mentioned payment, the plaintiffs knew, but the defendants did not know, of the loss of the vessel.

On the 25th of April, 1873, the defendants, having heard of the loss of the Scanderia, wrote requesting the plaintiffs "to pay the balance due on the contract, amounting to 1800*l.*" On the 26th the plaintiffs replied that, "looking at the work which the defendants had not been called upon to perform, they considered that they had already paid all that they could be required to pay in respect of the engines, if indeed they had not already paid more than a proportionate part of the contract price."

On the 10th of May, 1873, the plaintiffs gave notice to the defendants stating that the contract of the 18th of December, 1871, having come to an end, they required the defendants to deliver to the plaintiffs the boilers and other machinery and things made by the defendants under the contract, and, in default of delivery, threatened proceedings. On the 21st of May the defendants' solicitors wrote, stating that the defendants were willing to hand over the boilers and other machinery asked for, "on being paid the amount of their lien." Subsequently, on the 23d and 28th of May, in answer to letters of inquiry as to their meaning, the defendants' solicitors wrote that the amount claimed by the defendants as their lien was the amount of the last instalment under the contract, viz., 1800*l.* They, however, proposed that the question should be disposed of under the arbitration clause, which offer was declined by the plaintiffs.

The case further stated: "The total sums paid under the contract by the plaintiffs to the defendants are, 5800*l.*, in respect of the Minia, and the two above-mentioned sums of 2000*l.* each in respect of the Scanderia. The

defendants have received the old materials, valued at 353*l.*, out of the Minia. No offer of any further sum has been made by the plaintiffs to the defendants. The defendants, at the date when they heard of the loss of the Scanderia, had completed 71 per cent of the whole work contracted for in respect of the Scanderia. At that date the price of labor and materials was higher than at the date of the contract."

A careful perusal of the specification seems to us to establish that the contract was for one entire job, for which 5800*l.* was to be received on one side, and 353*l.* value in old materials on the other. The full performance of this contract having been rendered impossible by the loss of the Scanderia, we think that the plaintiffs cannot maintain that any property has passed, and that therefore the claim in detinue fails.[1]

The second ground upon which the plaintiffs rested was a claim to be repaid the two sums of 2000*l.* paid by them, as money had and received. With regard to the first of these sums, it seems to us to be clear that it was paid in pursuance of the contract, and under such circumstances that the parties could not be placed *in statu quo* by its repayment. The boilers certified to be plated may have been either of more or less value than 2000*l.*, or of more or less profit or loss relatively to the rest of the subject-matter of the contract. The defendants are guilty of no wrong in not having fitted the boilers in question to the plaintiffs' ship. It seems quite plain that, if the ship had perished during the currency of the bill at four months given for the second 1000*l.* payable upon the plating of these boilers, that would have been no answer, as between the parties, to an action on the bill.

With regard to the second 2000*l.*, there is a still further objection to its recovery in an action for money had and received. Before the plaintiffs paid that sum to the defendants, they were aware of the loss of the Scanderia; and the defendants were not aware of it. It cannot, therefore, be maintained that it was paid by the plaintiffs upon a consideration which has since failed; for it was paid with knowledge of the facts, which were unknown to the defendants.

We are therefore of the opinion that the plaintiffs have failed to sustain either of the grounds upon which alone they contended that any right of action against the defendants could be supported, and that we are bound to give judgment for the defendants.

Judgment for the defendants.[2]

[1] The discussion of this question has been omitted. — Ed.

[2] The plaintiffs in this brought error to the Court of Exchequer Chamber, but on the suggestion of the court the matter was submitted to arbitration, and no judgment was given. L. R. 10 C. P. 571. — Ed.

NATHANIEL GRIGGS *et al.* *v.* SAMUEL AUSTIN *et al.*

In the Supreme Judicial Court of Massachusetts, March Term, 1825.

[*Reported in* 3 *Pickering*, 20.]

Assumpsit for money had and received and for money lent and accommodated.

The plaintiffs, to maintain their action, offered to prove, that in November, 1822, they shipped on board the ship Topaz nine hundred and four barrels of apples, to be carried to the port of Liverpool, and that freight was paid in advance to the defendants, they being owners of the ship for the intended voyage; that no deduction was made from the usual freight on account of advance payment, and that there was no agreement that freight was to be allowed at all events; that the ship was stranded at Crosby, about six miles below the port of Liverpool, and that the greater part of the apples belonging to the plaintiffs was lost.

The defendants objected to this evidence, contending that the freight having been paid in advance, they were not liable to repay it, the apples being lost without their fault, and there having been no agreement to refund in case of such loss.

This objection the judge overruled, intending however to reserve the question. The plaintiffs accordingly proved the stranding of the vessel and the loss of the apples.

In the bill of lading it was expressed, that the apples were to be delivered "in the like good order and well-conditioned, at the aforesaid port of Liverpool, the danger of the seas only excepted, unto Mr. William Graves [one of the plaintiffs] or to his assigns, he or they paying freight for the said goods nothing, being paid here."

W. Prescott and *J. T. Austin* for the defendants.

S. Hubbard for the plaintiffs.

Parker, C. J. This action is *indebitatus assumpsit* on money counts. It is brought to recover back a sum of money paid by the plaintiffs to the defendants for the freight of a number of barrels of apples taken on board their ship, the Topaz, bound from Boston to Liverpool. It is proved by the bill of lading signed by the master, and an account made out by the owners, with their receipt upon it, that the whole freight agreed upon was paid before the sailing of the vessel, and the report finds, that before the vessel arrived at her port of delivery abroad, she was stranded or wrecked on a beach within six miles of her port, by means of which a large portion of the plaintiffs' apples were destroyed, or rendered worthless by the salt water.

This brief statement presents the principal question which has been

argued; there are other facts in the report material to some inferior questions, which will be stated in their proper place.

The plaintiffs contend that the consideration for the payment of the money was the agreement on the part of the owners to transport the apples in their ship to Liverpool; and that having failed to do this, they are bound in conscience to return the money; and that an action at law lies for it, upon the ground of failure of consideration. The defendants insist, that the payment of the freight in advance imposes all risks upon the owner of the goods, and that the failure of transportation and delivery having happened without their fault, there is no legal nor equitable principle which will oblige them to refund. Some reliance in support of their defence is placed upon the condition expressed in the bill of lading, that the goods are to be delivered safely, "the dangers of the seas excepted;" but as this condition has in practice been applied only to the contract in relation to the goods themselves, so as to protect the ship-owner from a demand for their value in case of loss by perils of the sea, and has never been construed to bear upon the rights of the parties in relation to the freight, we cannot see anything in that instrument which can affect the question before us. This must stand upon the principles of marine or mercantile law, so far as they may have been recognized and adopted, or may be found agreeable to the rules and maxims of the common law.

It is certainly a clear principle of the common law, that when money is paid or a promise made by one party in contemplation of some act to be done by the other, which is the sole consideration of the payment or promise, and the thing stipulated to be done is not performed, the money may be recovered back, or the promise founded on such consideration may be avoided between the parties to the contract. This general principle is the foundation of perhaps the largest class of cases which have been sustained under the action for money had and received. Exceptions may be made by a stipulation of the parties, but without such exceptions the rule seems to be universal.

And this broad principle of justice has been adopted in the marine law, in relation to this subject of freight, upon the continent of Europe, as is very fully proved by the researches made and the cases cited by Chief Justice KENT, in the case of Watson *v.* Duykinck.[1]

It would be but an affectation of learning to go over the ground which has been so ably preoccupied in the opinion given in that case, especially as the same ground has been traversed by Mr. Justice STORY in a note in his edition of Abbott on Merchant Ships, etc., which note was avowedly supplied from the opinion of Chief Justice KENT above cited. I wish for one, since books are so prodigiously multiplied, to spare the profession and the public the expense of reiterated citations on points indubitably settled, when both text and comment may be found in almost every book in a lawyer's

[1] 3 Johns. 335.

library. It is sufficient then to say, that by reference to the above cited opinion and the note of Mr. Justice STORY, it will be found to be the established law of the maritime countries on the continent of Europe, that freight is the compensation for the carriage of goods, and if it be paid in advance, and the goods be not carried by reason of any event not imputable to the shipper, it is to be repaid, unless there be a special agreement to the contrary.

The commercial principle recognized by the continental nations is reduced into the form of a maxim in the Napoleon Code de Commerce, tit. 8, art. 302. "No freight is due for merchandise lost by shipwreck or stranding, plundered by pirates or taken by enemies. The master is bound to restore freight which shall have been advanced, if there is no agreement to the contrary." This, like most of the provisions in the modern French codes, is not the introduction of a new principle, but the new promulgation of antecedent law in a more convenient form, as was the case with the "Digest" and other works executed under the auspices of Justinian, of whom the emperor Napoleon was in this respect an imitator.

It is admitted in argument, that such is the law of the continental powers, but it is suggested that it has not been introduced into the English law, and, therefore, there is no evidence that it belongs to our common law. It is true there are few cases in the English books touching this point, but it is equally true that the principle has never been denied there; on the contrary, in the case cited from 1 Campb. Lord ELLENBOROUGH, who was a great mercantile judge, recognizes it in the full extent of the Code de Commerce; and the cases cited from 4 M. & S., 2 and 4 B. & A. and 5 Taunt. proceed upon the ground of a stipulation in the several contracts which were under discussion, similar to the exception in the continental rule above cited; and the *obiter* remark of Mr. Justice BAYLEY, in the case of De Silvale *v.* Kendall, that wherever there is an express stipulation that freight shall be paid in advance, there must be an express stipulation that it shall be recovered back if the goods be not carried, if such be the intention, will be found not to militate against the general principle.

A distinction was raised in the argument, between payment of freight and an advance of it, it being supposed to be recoverable back in the latter case, but not in the former. But we do not find this distinction supported by authorities, nor do we see any sound reason for it. We think an advance of freight means the same thing as payment of freight beforehand or in advance, and whether the whole is paid or a part we think makes no difference.

In the English cases cited a very nice discrimination has been adopted between a contract for freight, which includes an obligation to transport and deliver, and a contract to receive the goods on board the vessel. That a contract of the latter nature may be made, so that it will be considered as executed by the mere lading of the goods, we do not doubt; but we

cannot think that such a contract can be implied from the mere fact of the freight's being paid down, because reasons may and often do exist for exacting this, without any intention to vary the legal liabilities of the parties. If persons apply for a passage in a vessel, as is often the case between this country and Great Britain, whose responsibility may be doubtful, and they are received on board at the customary price on condition of advancing the passage-money, and the vessel should be wrecked immediately on commencement of the voyage, so that the passengers would have to seek another vessel and pay their passage-money again, we cannot think that the master or shipowner would have a right to retain the money, unless there were an express agreement to that effect. The case of Watson *v.* Duykinck above cited is somewhat of this nature. In that case the voyage was broken up two days after its commencement, and the passenger, instead of being carried to the island of St. Thomas, was landed in Connecticut. He however was not allowed to recover back the passage-money which had been paid in advance, on the ground that the consideration was an agreement on the part of the master to suffer him to proceed in the sloop, etc., and that the master had suffered him to come on board, which was an execution of the contract. I confess this does not seem to me to be the most obvious effect of the contract; but it was by this construction only that the defendant prevailed, the court being clear that were it a common case of passage-money paid in advance, by the principles of the marine law, engrafted into the common law, it must have been recovered back. The same principle applies with equal force to money paid in advance for the freight of goods. Such payment does not import a relinquishment of any right, for it may have been exacted because the goods themselves might not be a sufficient security for the freight, and the owner of the goods might not be responsible.

The case before us is likely to have been of that kind. Fruit was the subject of the contract; it was of a perishable nature and liable to great uncertainty as to its value in a foreign market; the owner of it may have been a person of no property; and for these reasons the payment down may have been exacted.

But one of the counsel for the defendant has put the case on ground which admits the general principle that freight may be recovered back when the goods are not delivered, unless there be an agreement to the contrary, but he insists that such an agreement does appear from the evidence, that is, from the bill of lading and the receipt on the account. But we think they furnish no evidence of such an agreement; they merely prove that the freight was paid in advance.

Indeed it will be seen at once, that if the payment of freight thus proved were to be construed into a stipulation that it should not be recovered back, the whole doctrine of the marine law on this subject would be useless. The maxim is, that freight paid in advance, if the goods be not

carried, shall be returned, unless there be a stipulation to the contrary. Now if the mere payment proved such stipulation there would be no case for the rule to operate upon. So that when Mr. Justice BAYLEY says, that where there is an express stipulation to pay freight in advance, there must also be an express stipulation to pay it back in order to entitle the shipper to recover, he means something more than the mere payment of the freight, which may be equivocal. He means undoubtedly an express stipulation in the contract, because it might be inferred from such a stipulation that the parties had calculated hazards, and that an equivalent had been obtained in some form for the advance of money which otherwise would be due only on a contingency. And he was there reasoning upon a case which might fairly sustain such an argument.

It is said that the rate of exchange between this country and England gave an advantage to the plaintiffs which may have been the consideration for paying freight in advance. That fact does not appear in the report, and if it did it could not affect our decision. If the intent of the parties had been submitted to the jury, as was done by Chief Justice GIBBS in the case cited from 5 Taunt. 435, it might have been material, but we do not find that the fact was offered to be proved at the trial, so that we do not see that any use can now be made of it.

Judgment for the plaintiffs.[1]

[1] It is settled by the authorities referred to in the course of the argument that by the law of England a payment made in advance on account of freight cannot be recovered back in the event of the goods being lost, and the freight therefore not becoming payable. I regret that the law is so. I think it founded on an erroneous principle and anything but satisfactory ; and I am emboldened to say this by finding that the American authorities have settled the law upon directly opposite principles, and that the law of every European country is in conformity to the American doctrine and contrary to ours. — COCKBURN, C. J., in Byrne *v.* Schiller, L. R. 6 Ex. 319, 325. — ED.

END OF VOL. I.

UNIVERSITY OF CALIFORNIA LIBRARY
Los Angeles
This book is DUE on the last date stamped below.

APR 1 8 1970
Law Library
FEB 8 1984
FEB 3 1984

Form L9–Series 4939

UC SOUTHERN REGIONAL LIBRARY FACILITY
AA 000 799 297 7